

Re: Vincent McLeod

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(CONSOLIDATED)

**IN THE MATTER OF VINCENT MCLEOD,
NORTHERN STATE PRISON.**

OAL DKT. NO. CSR 00222-16
AGENCY DKT. NO. N/A

**IN THE MATTER OF VINCENT MCLEOD,
NEW JERSEY DEPARTMENT OF
CORRECTIONS, NORTHERN STATE PRISON.**

OAL DKT. NO. PRC 13688-16
PERC DKT. NO. CI-2016-034

David J. Heintjes, Esq., for petitioner/appellant

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

Record Closed: September 19, 2016

Decided: September 30, 2016

BEFORE **IMRE KARASZEGI, JR.**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Vincent McLeod (McLeod), a senior correction officer, appealed a major disciplinary action by respondent, Northern State Prison (Northern State), Department of Corrections (DOC), removing him effective November 19, 2015. Northern State alleges that he violated N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; N.J.A.C. 4A:2-2.3(a)(12),

other sufficient cause, involving the violation of various provisions of a rule, regulation or policy, specifically, HRB 84-17(b)(2), HRB 84-17(c)(11), HRB 84-17(d)(7), and HRB 84-17(e)(1). Appellant also alleges that DOC committed an unfair practice under the New Jersey Employer-Employee Relations Act by not allowing union representation during an investigatory interview.

Northern State prepared a Preliminary Notice of Disciplinary Action (PNDA) against appellant on September 28, 2015, and a Final Notice of Disciplinary Action (FNDA) on November 17, 2015, removing him effective November 19, 2015. On December 3, 2015, McLeod requested a hearing and forwarded simultaneous appeals to the Civil Service Commission (CSC) and the Office of Administrative Law (OAL), pursuant to N.J.S.A. 40A:14-200 et seq. Due to a filing error, petitioner's initial appeal was deemed defective; however, upon receipt of the Law Enforcement Officers Appeal Form, McLeod's appeal was perfected on January 4, 2016. On February 26, 2016, respondent filed a Motion for Summary Decision, which was denied by Order dated March 16, 2016. I commenced the first day of hearing on March 30, 2016. Prior to the second day of hearing, PERC issued an unfair practice charge and notice of prehearing telephone conference on May 13, 2016. On May 26, 2016, respondent filed with the OAL a motion to consolidate the Civil Service and PERC and to find that the CSC has the predominant interest. On June 1, 2016, McLeod, through his attorney, advised that he did not oppose respondent's motion for consolidation and determination that the CSC has predominant interest in the matter. On July 18, 2016, I issued an Order of Consolidation and Predominant Interest, consolidating the CSC and PERC matters with CSC having the predominant interest in the matter. On August 23, 2016, the CSC and PERC issued a Joint Order modifying my July 18, 2016, Order and determining instead that PERC shall have the predominant interest since PERC's unfair practice jurisdiction is exclusive. In addition to March 30, 2016, I heard the matter on June 15, 2016, and July 19, 2016. The PERC complaint was formally transmitted to the OAL on September 8, 2016. The record closed on September 19, 2016, after receipt of written summations from both parties.

FACTUAL DISCUSSION

After carefully considering the testimonial and documentary evidence presented, and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I **FIND** the following **FACTS**:

1. McLeod, currently a senior correction officer, was hired as a correction officer at Northern State Prison, Department of Corrections, on December 23, 1995.
2. McLeod has had no major disciplinary actions recorded against him.
3. Since 2013, McLeod had been regularly assigned as the MIN 2 litter detail officer to supervise reduced-custody inmates as they picked up trash along various public roadways in the State.
4. On or about August 21, 2015, the litter detail assigned to McLeod was responsible for the trash pick-up along Route 21 in the area of Belleville, New Jersey.
5. Prior to arriving at their scheduled clean-up assignment, McLeod decided to purchase coffee and donuts for himself as well as for New Jersey Department of Transportation (DOT) staff who were normally present at DOT's Newark yard where the litter detail would return for their lunch break.
6. McLeod made an unauthorized stop and parked the DOC bus, with five inmates aboard, in front of a Dunkin Donuts in Belleville, New Jersey. McLeod secured the bus and maintained visual contact as he proceeded inside to purchase the coffee and donuts.
7. After approximately 3-5 minutes inside, McLeod returned to the bus, secured the remaining donuts for DOT staff and proceeded to the litter detail along nearby Route 21.

8. While working on the highway, Sgt. Gervasio Cordova, McLeod's immediate supervisor, arrived at the location, observed the inmates and inspected the bus.

9. At approximately 1:00 p.m., the MIN 2 litter detail arrived at the DOT Newark yard for the lunch break. One inmate was asked to carry the cooler containing the inmates' lunch and another inmate was asked to carry the box of donuts for the DOT personnel.

10. With four of the five inmates off the DOC bus and McLeod and one of the inmates still on the bus, Administrative Major Bruce Kerner arrived at the DOT yard to perform a spot inspection of the minimum unit. The inspection took place in response to a problem with the alleged smuggling and/or use of K2 or synthetic marijuana by the inmates.

11. As Kerner approached the DOC bus, he found an inmate in possession of a butane cigarette lighter.

Kerner, testifying for respondent, described his interaction with McLeod and the inmate who had been on the bus as follows:

At that point I took the lighter from the inmate. Mr. McLeod stated to me, "Kerner, Kerner, you know, I want to be honest. I gave him that lighter so they could smoke." I said, "Don't say—I don't want to hear anything." I stopped him right there.

McLeod, testifying on his own behalf, described Kerner's interaction with him in the following manner after Kerner found a cigarette lighter in one of the inmate's hands;

So then he says – he – I had – I stepped off the bus at that point and he asked – started questioning me about the box of doughnuts and the cigarette lighter. He asked me where the box of donuts came from. I was trying to tell him that I had given C. the doughnuts to carry inside, but the front door of the DOT was locked and there was so much stuff going

on he was – he was steadily hitting me with a barrage of questions to the point that he started asking me to explain stuff and I asked him for my union rep at that time. I asked him, “I’d like to have my union rep,” because he was asking me all kind of questions, where did this guy get the lighter? Why they got the box of doughnuts and in the midst of that I’m trying to explain to him everything about the doughnuts and – and the – and the lighter –

Q: Well, what was the –

A: . . . and things like that.

Q: response when you asked for a union rep?

A: He told me, “Not at this time.” He said – he said, “You got too much coming” – he – I think his words were you – he – he definitely said, “Not at this time,” and he said, “you had too much other stuff to worry about right now. Not at this time.”

Two inmates at the time of the incident testified on behalf of respondent. B.C. and P.B. both stated that a lighter was kept on the bus and served as a “community lighter” to be used by inmates for the purpose of smoking cigarette butts found on the ground as they performed their work in the litter detail. Neither B.C. nor P.B. witnessed the interaction between McLeod and Kerner at the DOT Newark yard.

Alix Lamboy, a senior investigator with the Special Investigative Division (SID), testified on behalf of respondent. Lamboy was tasked with interviewing the inmates involved in the August 21, 2015, incident. She indicated that all five inmates had given consistent statements to her that there was a “community lighter” that McLeod would give to them in order to smoke. Lamboy noted that she interviewed the five inmates “one-on-one” and that there were no written reports of the interviews. During cross-examination, Lamboy indicated that she did not remember definitively whether the five inmates provided written statements or audio recordings. When confronted with a written statement from one of the five inmates, noting that the inmate “never saw the lighter or anybody smoking,” Lamboy reiterated her recollection that all the inmates spoke of the donuts and lighter.

When the testimony of witnesses is in disagreement, it is the obligation and responsibility of the trier of fact to weigh the credibility of the witnesses in order to make factual findings. Credibility is the value that a fact-finder gives to the testimony of a witness. It requires an overall assessment of the witness's story in light of its rationality, its internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (8th Cir. 1963). A trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

After carefully considering the testimonial and documentary evidence presented and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I credit the testimony of McLeod more than the testimony of Kerner, B.C., P.B., and Lamboy. McLeod's testimony was consistent and his version of events involving his statements to and interaction with Kerner hung together more than the version provided by Kerner himself.

B.C. and P.B. reiterated the existence of what they referred to as a "community lighter," which they alleged was located on the bus for the inmates to use. Lamboy also noted that the statements of all five inmates were consistent as to the existence of a "community lighter." However, the written statement of one of those inmates, and the statements of Kerner and McLeod fail to mention a "community lighter." In fact, I **FIND** that the written statement of one of the inmates, contradicts Lamboy's recollection regarding the doughnuts and lighter. In addition, I **FIND** Kerner's recollection of McLeod's confession to him as incredible because it is both unlikely and without substantiation that a twenty-year veteran correction officer, with no major disciplinary actions recorded against him, who has supervised the litter detail for several years, would, without any questioning or provocation, volunteer the statement, "I gave him that lighter so they could smoke," while cognizant of the fact that disciplinary charges would be likely and that he had various labor rights/protections available to him prior to answering any question. Because of the inconsistency and lack of credibility in Kerner's version of events, I **FIND** that McLeod was confronted with questions from Kerner about

the doughnuts and cigarette lighter and McLeod did request the presence of a union representative at the time he was questioned by Kerner on August 21, 2015, and no union representative was provided.

LEGAL ANALYSIS AND CONCLUSIONS

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Both guilt and penalty are redetermined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

Northern State has charged McLeod with violating N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, involving the violation of various provisions of a rule, regulation or policy.

Under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 to -43 (NJEER or the Act), and the regulations promulgated thereunder, N.J.A.C. 19:10-1.1 et seq., public employers are prohibited from "interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act" and "[d]iscriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act." N.J.S.A. 34:13A-5.4(a)(1), (3). Any public employee or

his or her representatives may file with PERC a charge that a public employer has engaged in an unfair labor practice. N.J.S.A. 34:13A-5.4(c); N.J.A.C. 19:14-1.1 to -1.2.

In this case, it is undisputed that McLeod made an unauthorized stop and parked a DOC bus, with five minimum custody inmates aboard, in front of a Dunkin Donuts in Belleville, New Jersey, prior to arriving at an assigned litter detail location. In that regard, I **CONCLUDE** that respondent has proven, by a preponderance of the competent, credible evidence, the charge of neglect of duty. Although McLeod maintained visual contact and secured the DOC bus, McLeod admittedly violated the custody post orders which prohibit stops to and from a worksite. As to the charges of conduct unbecoming and other sufficient cause related to a violation of rules and regulations pertaining to undue familiarity related to the doughnuts and cigarette lighter, I **CONCLUDE** that respondent has not proven, by a preponderance of the competent, credible evidence the charges in this regard. No credible testimonial or documentary evidence was presented linking McLeod to purchasing doughnuts for the inmates on August 21, 2015, or giving the inmates in his detail a cigarette lighter. In addition, based on the record before me, I **CONCLUDE** that McLeod was questioned by Kerner regarding the doughnuts and cigarette lighter, which ultimately led to McLeod's disciplinary charges. I also **CONCLUDE** that McLeod was not provided a union representative at the time it was requested. As such, respondent engaged in an unfair labor practice.

Progressive discipline is an indelible part of the disciplinary process. It is well-settled that an employee's past disciplinary record may be used as guidance in determining what the appropriate penalty should be. See Bock, supra, 38 N.J. at 523. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number

and proximity of prior disciplinary infractions evaluated by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

McLeod has had no major disciplinary actions recorded against him during his twenty-year employment as a correction officer. McLeod admitted to making an unauthorized stop to purchase doughnuts for himself and DOT employees. Since the charge of neglect of duty is implicated in this regard, and it is the only charge that respondent has proven, by a preponderance of the competent, credible evidence, I **CONCLUDE** that the appropriate penalty should be a six-month suspension rather than removal.

ORDER

It is **ORDERED** that the charge of neglect of duty, specifically N.J.A.C. 4A:2-2.3(a)(7), be **SUSTAINED**. It is further **ORDERED** that the charges of conduct unbecoming a public employee, specifically N.J.A.C. 4A:2-2.3(a)(6); and other sufficient cause, specifically N.J.A.C. 4A:2-2.3(a)(12), involving the violation of various provisions of a rule, regulation or policy, be **DISMISSED**.

It is further **ORDERED** that the charge of unfair labor practice by respondent, pursuant to N.J.S.A. 34:13A-5.4(a)(1) and (3) be **SUSTAINED**.

It is further **ORDERED** that the penalty of removal of Vincent McLeod be **MODIFIED** to a **SUSPENSION** for a period of six months commencing on November 19, 2015.

I hereby **FILE** this Initial Decision with the **PUBLIC EMPLOYMENT RELATIONS COMMISSION**.

This recommended decision may be adopted, modified or rejected by the **PUBLIC EMPLOYMENT RELATIONS COMMISSION**, which by law is authorized to make the final decision on all issues within the scope of its predominant interest. If the Public Employment Relations Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest shall become a final decision in accordance with N.J.S.A. 52:14B-10.

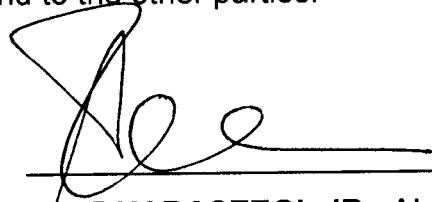
Pursuant to N.J.A.C. 1:1-17.8, upon rendering its final decision the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** shall forward the record, including this recommended decision and its final decision, to the **CIVIL SERVICE COMMISSION**, which may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its statutory grant of authority.

Upon transmitting the record, the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** shall, pursuant to N.J.A.C. 1:1-17.8(c), request an extension to permit the rendering of a final decision by the **CIVIL SERVICE COMMISSION** within forty-five days of the predominant agency decision. If the **CIVIL SERVICE COMMISSION** does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **CHAIR OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, 495 West State Street, P.O. Box 429, Trenton, New Jersey 08625-0429**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 30, 2016

DATE



IMRE KARASZEGI, JR., ALJ

Date Received at

**PUBLIC EMPLOYMENT
RELATIONS COMMISSION**



**DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**

Date Mailed to Parties:

OCT 3 2016

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APPENDIX

LIST OF WITNESSES

For Petitioner/Appellant:

Vincent McLeod

For Respondent:

Bruce Kerner

Amanda Robbins

Brian Darcy

Alix Lamboy

B.C.

P.B.

LIST OF EXHIBITS IN EVIDENCE

Joint:

- J-1 Final Notice of Disciplinary Action (FNDA) dated November 17, 2015
- J-2 Preliminary Notice of Disciplinary Action (PNDA) dated September 28, 2015
- J-3 McLeod work history
- J-4 Human Resources Bulletin 84-17 as amended

For Petitioner/Appellant:

P/A-1 Inmate statement

P/A-2 Special custody report, McLeod

For Respondent:

- R-2 Incident investigation and report
- R-3 Special custody report, Kerner
- R-5 Custody post orders
- R-6 Policy statement
- R-11 Law enforcement personnel rules and regulations
- R-12 DOC policy statement – Standards of Professional Conduct
- R-13 Handbook of information and rules
- R-15 Procedure: Possession and/or use of Tobacco in NJDOC facilities
- R-19 Video CD
- R-20 Certification of Bruce Kerner dated February 24, 2016



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
SALARY PAYMENT
(CONSOLIDATED)

**IN THE MATTER OF VINCENT MCLEOD,
NORTHERN STATE PRISON.**

OAL DKT. NO. CSR 00222-16
AGENCY DKT. NO. N/A

**IN THE MATTER OF VINCENT MCLEOD,
NEW JERSEY DEPARTMENT OF
CORRECTIONS, NORTHERN STATE PRISON.**

OAL DKT. NO. PRC 13688-16
PERC DKT. NO. CI-2016-034

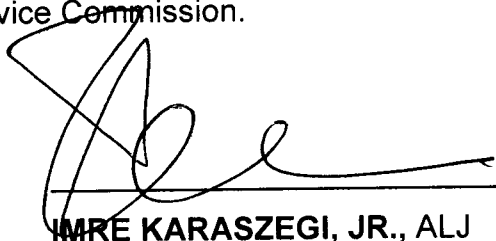
BEFORE IMRE KARASZEGI, JR., ALJ:

On this date, I issued an initial decision in this matter which recommended that some of the disciplinary charges against appellant be sustained, but that the penalty be reduced from termination to 180 days. Therefore, pursuant to N.J.S.A. 40A:14-203(c), I Order the appointing authority to begin paying appellant his/her base salary immediately upon expiration of the recommended period of suspension pending issuance of the final decision by the Public Employment Relations Commission and Civil Service Commission.

This Order is effective immediately and shall continue in effect until issuance of the Final Decision in this matter by the Civil Service Commission.

September 30, 2016

Date



IMRE KARASZEGI, JR., ALJ