

A-5



**STATE OF NEW JERSEY**  
**DECISION OF THE**  
**CIVIL SERVICE COMMISSION**

In the Matter of Monica Miller  
Northern State Prison,  
Department of Corrections

CSC DKT. NO. 2014-237  
OAL DKT. NO. CSV 11154-13

:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

**ISSUED: DECEMBER 8, 2016      BW**

The appeal of Monica Miller, Correction Sergeant, Northern State Prison, Department of Corrections, 90 working day suspension, on charges, was heard by Administrative Law Judge Leland S. McGee, who rendered his initial decision on November 3, 2016 reversing the 90 working day suspension. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on December 7, 2016, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the penalty has been reversed, the appellant is entitled to 90 days of back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10. Further, since the appellant has prevailed, she is entitled to counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay and counsel fees are finally resolved.

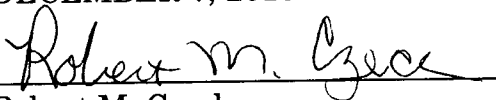
## ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Monica Miller. The Commission further orders that appellant be granted 90 days back pay, benefits, and seniority. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C. 4A:2-2.12*. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10* and *N.J.A.C. 4A:2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay or counsel fees.

The parties must inform the Commission, in writing, if there is any dispute as to back pay or counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R. 2:2-3(a)(2)*. After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION  
DECEMBER 7, 2016



Robert M. Czech  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

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

attachment



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. CSV 11154-13

AGENCY DKT. NO. 2014-237

**MONICA MILLER,**

Petitioner,

v.

**NORTHERN STATE PRISON,  
DEPARTMENT OF CORRECTIONS,**

Respondent.

---

**Frank Crivelli, Esq.,** for petitioner (Pellettieri, Rabstein, Altman, attorneys)

**Kathleen Asher,** Legal Specialist, for respondent New Jersey Department of Corrections (Kenneth C. Green, Director, Office of Employee Relations)

Record Closed: January 4, 2016

Decided: November 3, 2016

BEFORE **LELAND S. MCGEE, ALJ:**

**PROCEDURAL HISTORY**

Petitioner, a correction sergeant with the New Jersey Department of Corrections, was charged with numerous offenses including N.J.A.C. 4A:2-2.3(a)(3), N.J.A.C. 4A:2-2.3(a)(12), HRB 84-17(C-9), HRB 84-17(C-11), and HRB 84-17(E-1). On April 17, 2013, a lieutenant observed petitioner wearing a zip-up sweater that was not authorized

by department policy. The lieutenant gave petitioner a direct order to remove the zip-up sweater and petitioner refused to comply with the order. Petitioner told the lieutenant that she was not taking the sweater off because she was sick and not feeling well. A Preliminary Notice of Disciplinary Action was issued on April 23, 2013, and a Final Notice of Disciplinary Action was issued on July 2, 2013. Petitioner was disciplined and received a ninety-day suspension for insubordination and conduct unbecoming an employee.

The ALJ issued a prehearing order on December 5, 2013, and a hearing was held on June 11, 2014, and December 15, 2014. At the conclusion of the hearing, it was agreed that respondent's counsel would order a transcript of the hearing and petitioner would reimburse respondent for one-half of the costs.<sup>1</sup> After receipt of the transcript, the parties would submit closing briefs to the ALJ. This agreement was placed on the record at the end of the hearing on December 5, 2014.

Petitioner's counsel memorialized the agreement in a letter dated December 16, 2014, which he sent via mail to respondent's counsel. Petitioner sent a follow-up letter, dated March 4, 2015, requesting that respondent provide a copy of the transcripts. Petitioner sent an additional follow-up letter to respondent's counsel on April 24, 2015. Petitioner's counsel notes that his correspondences to respondent's counsel went unanswered and that the delay in procuring the transcript has caused petitioner hardship.<sup>2</sup>

At the request of petitioner's counsel, the ALJ held two conferences, one on July 16, 2015, and one on July 23, 2015, in order to ascertain the status of the transcript. During each of the conferences, respondent's counsel advised the court that the transcript had been ordered but had not yet been received. Respondent's counsel advised that she expected to receive the transcript in a few days. On August 20, 2015, petitioner filed a motion to dismiss the disciplinary charges and for the imposition of sanctions. Respondent's counsel notified the court by letter dated August 28, 2015, that

---

<sup>1</sup> (See n.4.)

<sup>2</sup> In his certification, petitioner's counsel avers that his client has been "severely prejudiced," and has suffered "financial detriment" as a result of the delay in procuring the transcript. However, his certification is lacking in details and specific instances of hardship.

she “. . . met delays in securing the transcripts in this matter due to accounting issues in our office,” and advised that she had not yet received the transcript. In addition, respondent’s counsel advised all parties that effective September 4, 2015, she would be on maternity leave and a replacement hire was not yet assigned to replace her.

On November 9, 2015, the undersigned issued an Order denying the Motion to Dismiss. Petitioner filed her post-hearing brief on January 4, 2016. By letter dated April 11, 2016, respondent advised the Court and petitioner that no post-hearing submissions would be forthcoming and the record closed. An Order of Extension nunc pro tunc extended the time for filing of an Initial Decision to August 25, 2016.

## **FACTUAL DISCUSSION**

### **Background**

The following background facts are undisputed. Accordingly, I **FIND** them to be the **FACTS** of this case.

Petitioner, Monica Miller (Miller or Sergeant Miller), a correction sergeant employed by Appellee Northern State Prison (Northern State), was charged with numerous offenses including (1) N.J.A.C. 4A:2-2.3(a)(3): inability to perform duties, (2) N.J.A.C. 4A:2-2.3(a)(12): other sufficient cause, (3) HRB 84-17 as amended C-9: insubordination, intention disobedience or refusal to accept an order; assaulting or resisting authority; disrespect or use of insulting or abusive language to supervisor; (4) HRB 84-14 as amended C-11: conduct unbecoming of an employee; and (5) HRB 84-17 as amended E-1: violation of any rule, regulation, policy, procedure, order, or administrative decision. The disciplinary report states the following:

On April 17, 2013, Lieutenant Bruce Kerner observed you wearing a zip-up sweater in Center Control, which was in violation of the “Custody Staff Uniforms NSP.CUS.1083” policy. Lieutenant Kerner reminded you that the zip-up sweater was no longer authorized. You stated that you were “not taking it off.” Lieutenant Kerner then gave you a direct order to remove the zip-up sweater and you replied “I’m not

taking it off. I'm sick, someone is going to have to buy me a new one." When Lieutenant Kerner later saw you in the Building #1 Lobby, you were still wearing the unauthorized sweater. Your actions were insubordinate and unbecoming of an employee.

Sergeant Angela Hinton was an eyewitness to the incident between Lieutenant Kerner and Miller. Northern State served Miller with a Preliminary Notice of Disciplinary Action, seeking to suspend her for a period of ninety days from her position as a Correction Sergeant with the New Jersey Department of Corrections (NJDOC). Northern State conducted a departmental hearing and sustained the disciplinary charges. Accordingly, on July 2, 2013, Northern State served Miller a Final Notice of Disciplinary Action, suspending her from employment for ninety days.

Miller appealed her suspension to the Civil Service Commission, and the Civil Service Commission transmitted the case to the Office of Administrative Law. Hearings were conducted and testimony was taken on May 11, 2014, and December 15, 2014.<sup>3</sup>

## **Parties' Arguments**

### **A. Miller**

Miller urges that the disciplinary charges against her should be dismissed in their entirety, as Northern State has failed to meet its burden that Miller engaged in insubordinate conduct. Miller also argues that her suspension for ninety days as a result of the incident is excessive, and contradicts the traditional principles of progressive discipline.

Miller argues that Northern State's basis for the charges relies on the assertion that she was insubordinate. However, she claims that this argument is "shortsighted" and fails to consider other evidence that shows that she was not insubordinate. In fact, Lieutenant Kerner, who was called to testify, admitted that he would have allowed an officer to continue wearing the sweater if that officer was cold or not feeling well.

---

<sup>3</sup> There are two volumes of transcripts for this matter. "T1" refers to the transcript of the hearing conducted on May 11, 2014, and "T2" refers to the transcript of the hearing conducted on December 15, 2014.

(T154:23-55:7.) Accordingly, Miller insists that she was not being insubordinate, based on Kerner's own admission that her behavior was permissible.

To this point, Miller stresses that Kerner was engaging in "selective enforcement" of the uniform policy. Other officers in the vicinity were not compliant with the uniform policy at the time, as they were not wearing their mandatory shank or ballistics vests. (T224:3-18.) Additionally, Miller testified to a long-standing past practice, in which any changes to the uniform policy are not enforced until after the collective bargaining agreement is settled and a clothing allowance is paid. (T226:13-19.) According to Miller, this past practice had been going on her entire career.

Additionally, Miller denies making the statement that someone would have to buy her a sweater. (T220:9-18.) Sergeant Hinton, an eyewitness to the incident, never indicated that Miller made such a statement in her Special Report recounting the incident. Additionally, Miller argues that Kerner's testimony does not reflect that she made such a statement. (T149:21-51:2.) Rather, he relies on "subjective interpretations" that inaccurately portray Miller's behavior. Miller claims that the inconsistencies in Kerner's testimony are not credible and must be rejected.

Finally, if I find that the charges against Miller are proper, she argues that her suspension from employment goes against the practices of progressive discipline. Miller relies on In re Warren, A-5092-09T3 (App. Div. August 3, 2012), <http://njlaw.rutgers.edu/collections/courts/>, to illustrate this point. In Warren, the Court found that both an employee's prior disciplinary record and the nature of the incident leading to the issuance of disciplinary charges are significant when determining an appropriate penalty. Miller has been employed by the NJDOC for approximately twenty-three years. She argues that the charges are excessive because they were not issued as a result of any misconduct, criminal action, or breaches of security and/or protocol.

#### B. Northern State

In a letter dated April 11, 2016, Northern State relied upon its proofs and "closing argument by Kathleen Asher, Esq. placed on the record May 11, 2014 and December

15, 2014.” However, the parties agreed that in lieu of closing arguments, they would submit post-hearing briefs. Northern State failed to file a post-hearing brief summarizing its position in this matter, and made no closing argument in this case.

### **LEGAL DISCUSSION AND CONCLUSIONS**

When the testimonies of witnesses are in disagreement, the trier of fact must weigh the witnesses' credibility in order to make factual findings. Credibility is the value that the fact finder gives to testimony of a witness and contemplates an overall assessment of the witness's story in light of its rationality, internal consistency, and manner in which it “hangs together” with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Credible testimony must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955); Gilson v. Gilson, 116 N.J. Eq. 556, 560 (E. & A. 1934). A fact finder is expected to base credibility decisions on his or her common sense and life experiences. State v. Daniels, 182 N.J. 80, 99 (2004).

In the present case, Lieutenant Kerner's testimony shows internal inconsistencies. Northern State asserts that Miller said that “someone would have to buy her a new sweater” when asked to remove it. However, when questioned about the incident, Lieutenant Kerner offered the following testimony:

- Q. All right. You would agree with me that Sergeant Hinton makes no mention that Sergeant Miller said, “Somebody's going to have to buy me a new one,” in her report; is that correct?
- A. No, Sergeant Miller did that herself in her report . . . .
- Q. And again, Lieutenant, there was no mention in Sergeant Hinton's report that Sergeant Miller stated, “Somebody's going to have to buy me a new one,” correct?
- A. No, sir.



Q. And it's your testimony that Sergeant Miller wrote in her report that she stated, "Somebody's going to have to buy me a new one?"

A. She basically stated that she did not receive a clothing allowance. She was not receiving a clothing allowance at that time. So she – verbatim what she spoke to me, but the implication was there.

Q. That's your interpretation?

A. That's my interpretation, yes, sir.

[T149:21-51:2.]

Lieutenant Kerner's testimony about Sergeant Miller's behavior relies on his "interpretation" of the events. However, a review of Sergeant Angela Hinton's Special Report, admitted into evidence as Exhibit R-2, suggests that Sergeant Miller never made such a statement. When questioned, Sergeant Hinton explained that when Officer Miller was asked to remove her sweater, she stated "she couldn't because she was not feeling well." She did not hear Officer Miller make any other comments after that. (T2:8:15-9:7.) Furthermore, Sergeant Miller testified that she did not raise her voice to Lieutenant Kerner at any point during the incident, nor did she state that someone would have to buy her a new sweater. She testified:

Q. All right. Within the body of the specification, it reads that Lieutenant Kerner reminded you that the zip-up sweater was no longer authorized. You stated that you were not taking it off. Lieutenant Kerner then gave you a direct order to remove the zip-up sweater, and you replied, "I'm not taking it off. I'm sick. Someone is going to have to buy me a new one." Did you ever say that someone was going to have to buy you a new sweater?

A. No.

[T2:20:9-18.]

Lieutenant Kerner's "interpretation" is inconsistent with the testimony of both Sergeant Miller and Sergeant Hinton. Sergeant Hinton never indicated that Sergeant Miller made such a statement in her Special Report or her testimony. In light of the

evidence as a whole, the Court should not rely on Sergeant Kerner's testimony asserting that Sergeant Miller suggested that someone would have to "buy her a new sweater" when evaluating the insubordination charge.

Next, Miller asserts that a ninety-day suspension violates principles of progressive discipline, which have been adopted and codified by the New Jersey Department of Corrections. The principle of progressive discipline was established in West New York v. Bock, 38 N.J. 500 (1962), in which the Court acknowledged that discipline for prior misconduct can be a factor in determining the appropriate penalty for present misconduct. In Bock, the Court used evidence of a firefighter's pattern of tardiness in evaluating his ultimate dismissal from public service. Id. at 523. The Court found that when assessing the reasonableness of a sanction as severe as removal or suspension, the employee's past disciplinary record should be reviewed for guidance in identifying an effective and appropriate punishment. Ibid.

An infraction is considered to be severe enough to bypass the progressive disciplinary scheme where the employee's position involves public safety and the infraction results in a risk to persons or property. See e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980). In Henry, a correction officer was removed from his position for submitting a falsified report of his discovery of marijuana. Id. at 574. The Department ordered his removal after finding him guilty of neglect of duty and conduct unbecoming of an employee, despite the fact that no prior disciplinary action had been taken against him. Ibid.

In the present case, Sergeant Miller has been employed by the NJDOC for approximately twenty-three years. The record does not show any prior disciplinary infractions during the course of her employment. The incident leading to the issuance of the disciplinary action against her revolves around her failure to remove a newly unauthorized sweater, and does not involve any criminal action or breach of security.

Additionally, Lieutenant Kerner's own testimony suggests that the unauthorized wearing of the sweater has been acceptable in the past. When questioned, he offered the following testimony:

Q. And let's talk about this as a practical matter, that other officer that you observed in Center Control wearing the wrong sweater, if that officer or if Sergeant Miller for that matter said to you, "Listen, I'm really not feeling well, would it be okay for today if I continued to wear my sweater, I'm cold, I don't have a jacket with me, I don't have anything else with me, I'm cold," how would you have responded to that?

A. I would've allowed it.

[T154:23-55:7.]

Lieutenant Kerner's testimony regarding the sweater does not indicate that Sergeant Miller's actions warranted a ninety-day suspension, as this behavior has been accepted in the past. Sergeant Miller was suffering from an illness, as she had just gotten over a cold and suffers from anemia. (T223:1-24:2.) Her conduct does not amount to egregious behavior to warrant the harsh penalty. Additionally, she ordered and purchased a new sweater on the day of the incident, "because it was obvious it was going to be a problem." (T239:24-40:7.)

Given these factors, it is evident that the penalty is "disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness . . ." Warren, supra, A-5092-09T3 at \*12-14. However, Courts understand that discipline in the workplace for public servants is critical: "Correction officers are understandably held to a higher standard than other public employees. We are also fully cognizant of the potential security ramifications of these types of mistakes." Ibid. Sergeant Miller had a forty-five minute delay in responding to the order to remove her unauthorized sweatshirt. The NJDOC uniform policy is telling on guidelines for the discipline of violations. It reads:

Any custody staff member in violation of acceptable uniform standards shall be ordered to produce the missing item(s) within two (2) days or provide a valid receipt indicating that the article(s) had been ordered. After this time period, the non-compliant custody staff member shall be subject to disciplinary action.

[Exhibit R-6 at p. 24.]

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). Therefore, the judge must “decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth.” Jackson v. Delaware, Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). For reasonable probability to exist, the evidence must be such as to “generate belief that the tendered hypothesis is in all human likelihood the fact.” Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959). 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).

I **FIND** that the weight of the evidence is in favor of Petitioner.

Northern State has not met its burden of proof on the charges in this case. Insubordination may consist of refusing or failing to follow the instructions of a supervisor. See Eaddy v. Dep’t of Transp., 208 N.J. Super. 156, 158-59 (App. Div.), certif. granted, 104 N.J. 392, order vacated, appeal dismissed, 105 N.J. 569 (1986). Although this term is not defined in the New Jersey Administrative Code, it is generally understood to be a refusal to obey a lawful and reasonable order that a superior officer is authorized to give. See Black’s Law Dictionary, 802 (7th ed. 1999). It is a fundamental principal of the workplace that, when an employee is given an order by a superior, that order will be followed. In re Osle, CSV 6289-01, Merit System Board (February 26, 2003), <http://njlaw.rutgers.edu/collections/oal/>. It is not for a public employee to second guess a superior’s order and refuse to obey that order because it would cause a result with which the subordinate does not concur. A public employee who intentionally disobeys a proper order does so at his or her own risk. Headen v. E.

Jersey State Prison and Dep't, 94 N.J.A.R.2d (CSV) 623, 627. Unless an order endangers one's health or safety, it should be obeyed, and only challenged afterward. It is an employee's conduct in the context of the situation that must govern any determination as to whether an action constitutes insubordination. Osle, supra, CSV 6289-01.

I **CONCLUDE** that considering the totality of the evidence Northern State has not met its burden of proof that Miller's conduct warranted Major Disciplinary Action.

### **ORDER**

It is **ORDERED** that the ninety-day suspension by the appointing authority is hereby **REVERSED**. It is further **ORDERED** that Monica Miller be awarded back pay for any suspension served in accordance with the guidelines set forth in N.J.A.C. 4A:2-2.10.

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

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

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

November 3, 2016

DATE

  
LELAND S. MCGEE, ALJ

Date Received at Agency:


November 3, 2016

NOV 7 2016

DATE

lr

Mailed to Parties:

  
DIRECTOR AND  
CHIEF ADMINISTRATIVE LAW JUDGE  
OFFICE OF ADMINISTRATIVE LAW

**APPENDIX**

**LIST OF WITNESSES**

**For Petitioner:**

Sergeant Monica Miller

**For Respondent:**

Lieutenant Bruce Kerner

Sergeant Angela Hinton

**LIST OF EXHIBITS**

**For Petitioner:**

None

**For Respondent:**

- R-1 Final Notice of Disciplinary Action, May 12, 2009
- R-2 Special report of Sgt. Monica Miller
- R-3 Special report of Sgt. Hinton
- R-4 Special Report of Lt. Bruce Kerner
- R-5 Memorandum re: Uniform Staff Policy
- R-6 NSPC West Policy 1083
- R-7 Rules and Regulations
- R-8 Disciplinary Action Policy
- R-9 Work history
- R-10 Memorandum included with email