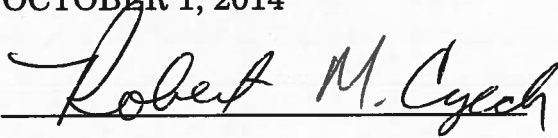


Re: Bradford Haberlin

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
OCTOBER 1, 2014



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
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

OAL DKT. NO. CSR 04603-14

2014-2471

**IN THE MATTER OF BRADFORD HABERLIN,
DEPARTMENT OF CORRECTIONS,
EAST JERSEY STATE PRISON.**

Robert R. Cannan, Esq., for appellant Bradford Haberlin (Markman & Cannan, attorneys)

Kelly Lichtenstein, Deputy Attorney General, for respondent Department of Corrections (John J. Hoffman, Attorney General of New Jersey, attorney)

Record Closed: July 15, 2014

Decided: August 29, 2014

BEFORE JAMES A. GERAGHTY, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant Senior Correction Officer Bradford Haberlin (appellant or Haberlin) contests the East Jersey State Prison (EJSP) notice of removal for, inter alia, conduct unbecoming and other sufficient cause including improper or unauthorized contact or undue familiarity with an inmate. (J-1 PNDA; J-2 FNDA.) He requested a hearing and the matter was filed with the Office of Administrative Law (OAL) on April 14, 2014. The

hearing was held June 20, 2014, and continued on June 23, 2014. The record closed on July 15, 2014, when the OAL received post-hearing submissions.

Appellant moved to dismiss the charges based on violation of the “forty-five day rule,” which proscribes a removal or other sanctions for violation of the internal rules and regulations established for Department of Corrections (DOC) employees unless the complaint charging a violation is filed no later than the forty-fifth day after the date on which the person filing the complaint obtains sufficient information to file the matter. This rule shall not apply if a violation of the internal rules and regulations is included within a concurrent investigation of a violation of the criminal laws. N.J.S.A. 30:4-3.11.

The Special Investigation Division (SID) commenced an investigation of appellant and an inmate in connection with a cell fire. SID referred the matter to the prosecutor’s office on September 26, 2013, and the latter informed SID that they would not be pursuing the matter criminally. Therefore, SID could proceed with an investigation. SID submitted an investigative report to the EJSP administration on January 31, 2014. The Preliminary Notice of Disciplinary Action (PNDA) was issued by Administrator Patrick Nogan on February 6, 2014, that is, six days after the administration received the SID report—well within the forty-five-day time limit. Consequently, the undersigned denied the motion to dismiss on the OAL hearing record. It is noteworthy that the forty-five day rule does not apply to charges brought under the New Jersey Administrative Code. McElwee v. Borough of Fieldsboro, 400 N.J. Super. 388 (App. Div. 2008).

The hearing commenced on June 20, 2014, and continued on June 23, 2014. The record closed July 15, 2014, when the OAL received the appellant’s post-hearing submission. Therefore, the Initial Decision (ID) would be due August 29, 2014.

STATEMENT OF THE ISSUES

The issue is whether respondent has proved that the appellant has committed the specified charges and that, if so, removal is the appropriate penalty.

FINDINGS OF FACT

Based on the testimony and documents of record, I **FIND**:

SCO Bradford Haberlin served at the EJSP when, on September 24, 2013, he visited inmate Velez when Velez was in temporary close custody (TCC) on no-contact status in Cell #3 at the prison infirmary. (R-6.) During the visit Haberlin brought Velez certain items, to wit: stationary, envelopes, and postage stamps, at around 3:45 p.m. Haberlin admitted that he went to Velez's cell on visiting the infirmary and presented him with said items from inmate Simpson, as well as a note from Simpson. (R-3.)

SID investigator Hyronda Strickland testified that there had been a fire in inmate Madrid's cell on September 20, 2013, which was believed to have been caused by a "stinger." A stinger is a metal coil that is plugged into a wall socket and is used to heat water. The initial suspicion was that the stinger had been left plugged in inadvertently. However, subsequently, SID had reason to believe that Velez was implicated in the fire. SID asked EJSP administration to isolate Velez in infirmary isolation Cell #3 on no-contact status. No contact means that the inmate is not permitted to have any staff contact without administration approval. Investigator Strickland testified that SID requested isolation for Velez because of an ongoing investigation and the isolated location of the cell. Strickland wrote a report. (P-1.)

Assistant Superintendent Colm Foley testified that he effected SID's request. Foley explained that an inmate subject to TCC is placed in a "close custody unit" for up to seventy-two hours. In such a case, an inmate can be placed in "one-left" a close custody wing, or at the infirmary. On the day in question, Foley visited the infirmary and signed the logbook at or about 3:15 p.m. He said that Haberlin was present and asked about Velez. Foley told him that Velez was in TCC on no-contact status. Haberlin asked Foley if there was anything to worry about and Foley replied in the negative. Foley further testified that his rank was above that of SCO and that as assistant superintendent he was administrator of the prison.

Haberlin testified that he did not hear Foley tell him that Velez was on no-contact status. Foley said that he was standing close to Haberlin during their brief conversation and that he had no need to repeat himself. Subsequently, Foley learned that Haberlin indeed visited Velez despite having been told that Velez was on no-contact status. Haberlin's testimony was contradictory. He said that he asked Foley why Velez was in the infirmary and Foley said that he did not know. Haberlin decided to find out for himself claiming that he was seeking information or "intel" [intelligence] from Velez.

Haberlin testified that stingers are permitted in the prison. He also stated that inmates are placed in the infirmary if they are sick and that he had no reason to believe that Velez was in the infirmary for any other reason. Assistant Superintendent Foley was credible and had no reason to dissemble.

Correction Officer Recruit (COR) Pedro Henao testified that he was the infirmary officer on the date in question and that Haberlin approached the secured infirmary door. Henao opened the door expecting Haberlin to request an item such as an aspirin but instead Haberlin bolted past him and strode directly to the isolation cell which he was able to do because the door to the isolation cell hallway was open. (P-2.) Henao stated that Haberlin went to Cell #3 whereupon Henao recorded him in the infirmary logbook as having arrived at the cell at 3:46 p.m. (R-4, R-5 Shift Commander Report.) COR Henao said that he found Haberlin's behavior peculiar because an officer will visit the infirmary if he needs items such as aspirin, and then wait until the item is obtained. Alternatively, officers will arrive for a specific purpose and explain it to the infirmary officer. They will make a notation in the infirmary logbook. Haberlin testified that his conversation with Henao was innocuous but that he did not explain why he was at the infirmary.

COR Henao testified that he did not know that Velez was on TCC no contact because he did not check the infirmary logbook before beginning his shift. However, he said that he was told that no one should have been down the hallway. He did not stop Haberlin because Haberlin walked right past him. Also, he told Haberlin as he left that

he had been recorded in the logbook. This news appeared to upset Haberlin. Haberlin denies this assertion.

During his testimony, Henao admitted that he did not lock the door leading to the isolation cell hallway, as it was his first time working in the infirmary, and that he did not realize that the door needed to be secured. Also, Haberlin stated that there was no sign on the cell door indicating Velez's status. However, his status was indicated in the logbook. Haberlin's attorney subpoenaed two other officers and proffered testimony that at the time in question there was no sign on Velez's cell door thus corroborating Haberlin's testimony. For some unexplained reason, the subpoenas were not delivered to these officers who did not appear at the hearing. I accepted the proffer and find that neither Velez's cell door nor surrounding area contained a sign stating that Velez was on restricted status. In any event, as Henao testified, Haberlin had no business in the infirmary without supervisory approval. (R-7.) Moreover, Haberlin visited an inmate who was in isolation regardless of his status, and brought him contraband, however innocent, from another inmate.

Haberlin did credibly testify that he had reasons to suspect that he was in danger from other inmates who were out to get him and that he needed intelligence to protect himself. Finally, Haberlin facilitated a transfer of items between inmates, something that is forbidden. Counsel for the prison correctly asserts that Haberlin's actions constitute "undue familiarity" and "conduct unbecoming." (R-8, R-9, R-10.)

Haberlin has a prior discipline. He received a 120-day suspension for falsifying a record after he submitted false information about an automobile accident to hide a DWI charge. He received a 120-day suspension that was reduced to 60 days, still a major discipline. (J-4.) Also, Haberlin had been out of work for eleven months for serious injuries received in a confrontation with an inmate who was assaulting another officer. (P-4.) He received a letter of commendation for his actions. (P-5.) It was his involvement in this episode that made him apprehensive returning to work and needing "intel" to determine whether he was in jeopardy.

SCO Morales testified authenticating a video tape of the infirmary area (P-1), and further testifying that good officers should obtain intel as no one is going to furnish them with needed information for their own protection. Purportedly, Haberlin hoped to obtain information from Velez or Simpson. In this respect, Haberlin's testimony was credible.

EJSP witnesses were credible and consistent. None had a motive to fabricate or were, in any sense, out to get Haberlin. Haberlin attempted to discredit the witnesses because of inexperience, specifically COR Henao and SID Investigator Strickland. Assistant Superintendent Foley displayed demeanor credibility. Haberlin displayed demeanor credibility but circumstantial credibility weighed against him. Specifically, he had no business taking advantage of an open door in an infirmary to approach Velez and hand off contraband from another inmate. Despite the lack of a warning sign as to Velez's status, Haberlin still had no reason to believe that it was acceptable for him to approach Velez under any circumstances. Haberlin's demeanor when Henao told him that he had recorded him at the infirmary was suspicious. The disagreement with Foley concerning the substance of their brief communication was never satisfactorily explained. The short of the matter is that Haberlin appeared to have something to hide and had no good reason for passing contraband to Velez. For these reasons, my credibility determination weighs in favor of respondent's witnesses.

LEGAL AUTHORITY AND ANALYSIS

The purpose of the Civil Service Act is to remove public employment from political control, partisanship, and personal favoritism, as well as to maintain stability and continuity. Connors v. Bayonne, 36 N.J. Super. 390 (App. Div.), certif. denied, 19 N.J. 362 (1955). The appointing authority has the burden of proof in major disciplinary actions. N.J.A.C. 4A:2-1.4. The standard is by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). Major discipline includes removal or fine or suspension for more than five working days. N.J.A.C. 4A:2-2.2. Employees may be disciplined for insubordination, conduct unbecoming a public employee, and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. An employee may be removed for egregious conduct without regard to progressive discipline. In re Carter,

191 N.J. 474 (2007). Otherwise, progressive discipline would be appropriate. W. New York v. Bock, 38 N.J. 500 (1962).

Hearings at the OAL are de novo. Ensslin v. Twp. of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994), certif. denied, 142 N.J. 446 (1995).

Police officers and correction officers are held to a higher standard of conduct than other citizens due to their roles in the community. In re Phillips, 117 N.J. 567 (1990). Correction officers are held to the same high standard of conduct as police officers. County of Gloucester v. Pub. Employment Relations Comm'n, 107 N.J. Super. 150 (App. Div. 1969), aff'd, 55 N.J. 333 (1970); Giarrusso v. E. Jersey State Prison, CSV 07406-03, Initial Decision (January 13, 2005), adopted, Merit System Board (February 23, 2005), <<http://njlaw.rutgers.edu/collections/oal/>>.

Conduct unbecoming a public employee is not defined in the New Jersey Administrative Code but has been interpreted broadly to include conduct that adversely affects morale and efficiency or that has a tendency to destroy public respect for the agency or its employees. In re Emmons, 63 N.J. Super. 136 (App. Div. 1960); Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32 (App. Div. 1992).

Other sufficient cause similarly is undefined in the New Jersey Administrative Code, but could include undue familiarity and unauthorized contact.

In this matter, the respondent seeks removal. (J-3.) A sanction imposed by an agency should be upheld unless it is arbitrary, capricious, unreasonable or not supported by substantial credible evidence in the record.

When ascertaining the reasonableness of a sanction, New Jersey courts have emphasized that consideration of the employee's past record should be reviewed for guidance. Bock, supra, 38 N.J. at 523-24; Moorestown v. Armstrong, 89 N.J. 560, 567 (1965); Feldman v. Irvington Fire Dep't, 162 N.J. Super. 177, 182 (App. Div. 1978). Where appropriate, concepts of progressive discipline involving penalties of

increasing severity are used in imposing a penalty and in determining the reasonableness of a penalty. Bock, supra, 38 N.J. at 523-24; In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). However, removal for cause may nonetheless be appropriate and in certain cases need not be preceded by less severe penalties. Golaine v. Cardinale, 142 N.J. Super. 385, 395-96 (Law Div. 1976). It is well-established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate regardless of an individual's disciplinary history. Henry v. Rahway State Prison, 81 N.J. 571 (1980).

I view appellant's conduct as serious but not egregious. I remind parties in civil service cases that removal is equivalent to civil service capital punishment. In this matter, the totality of the evidence and all of the other probative facts persuade me that something less than removal might be more appropriate. However, the decision is not for the OAL to make in the first instance. Upon review, "the test . . . is whether such punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." In re Polk, 90 N.J. 550 (1982). So, the question is not whether the OAL would have reached a different result, but rather whether the penalty chosen by the agency passes muster under the test as stated in Polk, supra. I cannot conclude that the agency's sanction would shock one's sense of fairness. Therefore, although I might have reached a different decision, I can only recommend that the agency reconsider the sanction. Therefore, as a matter of law considering the extant authority, the agency's recommended penalty is unassailable.

CONCLUSION

Based on the foregoing findings of fact and legal authority, I **CONCLUDE** that the appellant violated the Civil Service law as charged, I **RECOMMEND** that the penalty be reconsidered under all the circumstances, but otherwise **CONCLUDE** that the penalty of removal is sustained.

DISPOSITION AND ORDER

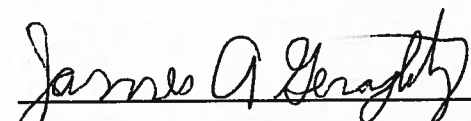
Based on the foregoing findings of fact and conclusion of law, I decide this matter in favor of the respondent and **ORDER** the petition **DISMISSED**.

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. 40A:14-204.

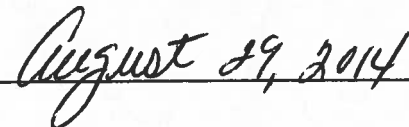
Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312**,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

August 29, 2014
DATE

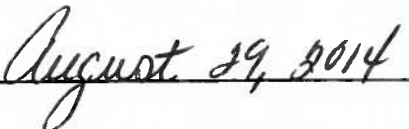


JAMES A. GERAGHTY, ALJ

Date Received at Agency:



Date Mailed to Parties:



jb

APPENDIX

LIST OF WITNESSES

For Appellant:

Bradford Haberlin, appellant

For Respondent:

Hyronda Strickland, SID Investigator

Colm Foley, Assistant Administrator

COR Henao

SCO Morales

LIST OF EXHIBITS

Joint Exhibits:

J-1 PNDA

J-2 FNDA

J-3 DOC Disciplinary Action Policy

J-4 Appellant's prior offense history

For Appellant:

P-1 Hyronda Strickland Report

P-2 COR Henao's message

P-3 No document

P-4 Haberlin Leave of Absent Report

P-5 Letter of Commendation

P-6 Collective subpoenas

For Respondent:

- R-1 Surveillance video of September 24, 2013, of isolation Cell #3
- R-2 No document
- R-3 Contraband photos
- R-4 Logbook
- R-5 Shift Commander Report
- R-6 Internal Management Procedures–Placement of Inmates in TCC
- R-7 Internal management Procedures–Responsibilities of 4 Up Housing Unit Officers
- R-8 DOC Policy Statement–Over Familiarity
- R-9 Law Enforcement Personnel Rules and Regulations
- R-10 DOC Handbook of Information and Rules