

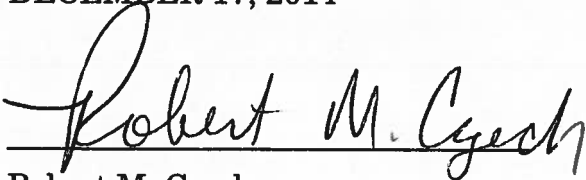
ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Thomas Caraccio. The Commission further orders that appellant be granted benefits and seniority for the period of separation to the actual date of reinstatement. However, the amount of back pay awarded is to commence on January 11, 2014, the date in which the ALJ determined the appellant submitted his return to work paperwork and is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Proof of income earned 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 and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay and 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 ON
DECEMBER 17, 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
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Trenton, New Jersey 08625-0312**

attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 07879-14

2014-3193

**IN THE MATTER OF THOMAS CARACCIO,
HUDSON COUNTY (CORRECTIONS).**

Christopher A. Gray, Esq., for petitioner (Sciarra & Catrambone, attorneys)

Chanima K. Odoms, Assistant County Counsel, for respondent (Donato J. Battista, County Counsel)

Record Closed: September 22, 2014

Decided: November 3, 2014

BEFORE BARRY E. MOSCOWITZ, ALJ:

STATEMENT OF THE CASE

On June 16, 2014, Hudson County removed Caraccio from his position as a county correction officer for not providing a note on and then returning to duty in a timely manner. No timetable, however, was ever established to provide the note or return to duty. Was Caraccio insubordinate? Did he neglect his duty? No. One cannot be insubordinate or neglect a duty in the absence of an order or a duty.

PROCEDURAL HISTORY

I.

On October 10, 2013, Hudson County serviced Caraccio with a Final Notice of Disciplinary Action. In its notice, Hudson County charged Caraccio with insubordination in violation of N.J.A.C. 4A:2-2.3(a)(2), conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6), neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7), and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11). Hudson County specified that on August 15, 2013, Caraccio was arrested for driving while intoxicated in violation of N.J.S.A. 39:4-50, and careless driving in violation of N.J.S.A. 39:4-97. In addition, Hudson County specified that on the same date, Caraccio had struck multiple vehicles and was observed urinating in public. Moreover, Hudson County demoted Caraccio from his position as sergeant to correction officer and suspended him for 120 days.

Caraccio immediately appealed the determination to the Office of Administrative Law and the hearing was held by another administrative law judge whose decision is still pending.

II.

On April 1, 2014, Hudson County served Caraccio with another Preliminary Notice of Disciplinary Action. In its notice, Hudson County charged Caraccio with insubordination in violation of N.J.A.C. 4A:2-2.3(a)(2), conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6), neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7), and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11). Hudson County specified that on December 12, 2013, Caraccio was evaluated by William B. Head, Jr., M.D. to assess his fitness for duty; that Head concluded in his report that Caraccio was fit for duty—provided he obtained a note from his treating psychiatrist agreeing that he was fit for duty; and that Caraccio had failed to provide the note and return to duty in a timely manner. As such, Hudson County suspended Caraccio effective April 1, 2014, and sought his removal.

On June 16, 2014, Hudson County served Caraccio with a Final Notice of Disciplinary Action. In its notice, Hudson County sustained its charges and specifications, except for the charge of other sufficient cause. As a result, Caraccio was removed from his position as a correction officer, effective June 16, 2014.

On June 24, 2014, Caraccio filed an appeal directly with the Office of Administrative Law. An initial prehearing conference call was held on July 15, 2014, during which time immediate hearing dates were offered. The parties estimated that two hearing dates would be required and agreed to two hearing dates in September 2014. The hearing was scheduled for hearing on September 22, 2014, and September 26, 2014. On September 22, 2014, I held the hearing and closed the record. The second hearing date was not needed.

DISCUSSION AND FINDINGS OF FACT

I.

Kalimah Ahmad is the legal advisor to the Hudson County Correctional Facility where Caraccio worked and the one who drafted the Final Notice of Disciplinary Action in this case.

Ahmad testified that the psychiatrist who performed the fitness for duty exam in this case, William Head, Jr., M.D., concluded in his fitness for duty report that Caraccio was fit for duty but wanted a note from his treating psychiatrist, Edward Farkas, M.D., agreeing that Caraccio was fit for duty before Caraccio would be returned for duty.

Ahmad further testified that on December 13, 2013, she advised Caraccio that she needed the note from Farkas before he could return to duty, but that she did not receive the note from Farkas until March 20, 2014, at which time she reported its receipt to county counsel, who drafted the Preliminary Notice of Disciplinary Action seeking removal of Caraccio from his position as a county correction officer.

Ahmad testified on cross-examination that she was not privy to any conversation between Caraccio and county counsel before this date or why county counsel drafted the preliminary notice when he did.

Significantly, Ahmad further testified on cross-examination that she is not familiar with the fitness for duty policy in Hudson County or the procedure in Hudson County for returning someone to duty.

A.

The relevant portion of the fitness for duty report is reproduced below. The report clearly states that no objective clinical evidence of any psychiatric condition existed that would have prevented Caraccio from returning to work. It also provides no timetable for Caraccio or Farkas to submit the note:

COMMENTS & CONCLUSIONS

The following conclusions have been made within a reasonable degree of medical certainty.

I found no objective clinical evidence of any psychiatric condition that would prevent Sgt. Caraccio from returning to full duty as a Corrections Sgt. at this time.

However, for the sake of completeness, I would add that, prior to his return to duty, his treating psychiatrist, Dr. Farkas, should write a note regarding his opinion regarding the Sergeant returning to duty. So long as Dr. Farkas agrees, I would conclude that Sgt. Caraccio should now be cleared for return to duty, as his clinical psychiatric examination is normal.

[C-2 at page 10.]

B.

The letter Ahmad then sent to Caraccio also provides no timetable for Caraccio or Farkas to submit the note:

Dear. Mr. Caraccio:

Enclosed for your review is a copy of the report of your examination on December 2, 2013 with Dr. William B. Head, Jr. I direct your attention to page 10 of the report under the section "COMMENTS & CONCLUSIONS" where Dr. Head concludes that **your treating psychiatrist, Dr. Farkas[,] provide us with a note regarding his opinion of returning to work prior to returning to duty.** Please be guided accordingly.

Once my office receives the note from your psychiatrist you will be contacted to report back to work. In efforts to expedite this process, feel to provide your doctor with my email address (kahmad@hcnj.us). If you have any questions, contact me at my extension below.

Very truly yours,

Kalimah H. Ahmad
Human Resources, HCDOC

[C-3 (emphasis in the original).]

II.

Ahmad testified that on March 20, 2013, she received the note. But the note had previously been sent to county counsel between January 11, 2014, when Farkas wrote the note, and March 20, 2013, when Ahmad received it. Like the report, the note clearly states that Caraccio was fit for duty:

January 11, 2014

RE: Thomas Caraccio

To Whom It May Concern:

As the treating psychiatrist of the above individual I see no reason not to concur with the report and conclusions of Dr. Head. I have in fact now [seen] Tom on three separate visits to my office finding him a personable, bright person without psychiatric contraindications to his return to his former position. This is of course provided he remains in control of his drinking and continues his work with AA.

Sincerely,

Edward Farkas, M.D.
Board-Certified Psychiatrist

[C-5.]

A.

Although this note from Farkas had not been forwarded to Ahmad or Head before March 20, 2013, Ahmad had no qualms about receiving it when she did. Evidence of this is the fact that Ahmad provided no timetable for the submission of the note; the fact that Ahmad never contacted Caraccio, Head, or county counsel between December 13, 2013, and March 20, 2014, to learn the status of the note; and the fact that Head alerted Ahmad that he had not yet received the note. In other words, Ahmad did not alert Head or county counsel that she had not yet received the note.

Additional evidence of the fact that Ahmad had no qualms about receiving the note when she did is the fact that that county counsel (not Ahmad) then advised Caraccio that Ahmad and Head had not received the note; the fact that Caraccio emailed another copy of the note to county counsel (not Ahmad); and the fact that county counsel (not Ahmad) drafted the Preliminary Notice of Disciplinary Action.

In fact, Ahmad simply returned Caraccio to work on April 9, 2014, when Head cleared Caraccio for his return, and had absolutely no part in the preliminary discipline.

As far as Ahmad was concerned, Caraccio had simply been suspended without pay since October 2013, with no timetable set for his return.

B.

More egregiously, Ahmad could provide no good reason for her assertion that Caraccio was insubordinate in March 2014 when she and Head received the note from county counsel but would not have been insubordinate in January 2014 had she or Head had received the note from Farkas or county counsel then.

Indeed her explanation that Caraccio was "absent without leave" between December 2013 and April 2014 was especially damning because she readily admitted that Caraccio was never charged with having been absent without leave and had simply been recorded as having been suspended without pay.

To make matters worse, Ahmad admitted that his personnel record was later changed from having been suspended without pay to "did not report."

C.

To repeat, Head cleared Caraccio to return to work on April 9, 2014, and Ahmad returned Caraccio to return to work on April 9, 2014, but county counsel sought his removal before then, and drafted the Preliminary Notice of Disciplinary Action on April 1, 2014, without discussing it with Ahmad, or even making her aware of it.

Then Ahmad changed tack and drafted the Final Notice of Disciplinary Action on June 16, 2014.

As such, these circumstances lend credence to the notion Caraccio raised during his testimony that Hudson County seized upon miscommunication between and among Ahmad, county counsel, and Caraccio, as an opportunity to remove Caraccio from his position as a county correction officer.

III.

Although Caraccio has self-interest in preserving his job and preventing his removal, I detected no such self-interest in his testimony. I only sensed straightforward statements of fact. And in doing so, I found Caraccio to be a more credible witness than Ahmad.

Caraccio testified that he saw Head on December 2, 2013, that he received his report on December 13, 2013, and that he contacted Farkas that day. Caraccio further

testified that he was informed Farkas was on vacation and that the soonest he could see Farkas was sometime before January 11, 2014. Caraccio then testified that he saw Farkas in early January 2014, that he received the note from Farkas by email on January 11, 2014, and that he forwarded the note by email to his attorney and Ahmad that day. As Caraccio testified, he forwarded it "immediately" and used the email address Ahmad had provided in her letter.

Meanwhile, Ahmad had admitted during her cross-examination that she sometimes does not receive emails that are sent to her.

In addition, Caraccio verified that he received the Preliminary Notice of Disciplinary Action from county counsel on April 1, 2014, before Ahmad returned him to work on April 9, 2014, and that he later saw his records had been changed from having been suspended without pay to "did not report."

Parenthetically, Caraccio explained that he no longer had a copy of the email forwarding the note from Farkas to his attorney and Ahmad because his email settings delete all emails older than thirty days and that it did not occur to him to keep a hard copy of that email.

Finally, Caraccio asserted that he never contacted Ahmad about his return to work because he had retained an attorney to represent him on his appeal of his 120-day suspension for driving while intoxicated, that he understood all communication was to have been through his attorney, and the he knew his attorney had already been working with county counsel on his return to duty.

Once more, I found this testimony by Caraccio to be straightforward, believable, and without artifice.

IV.

Given this discussion of the facts, I **FIND** that Caraccio saw Head on December 2, 2013; that Ahmad forwarded the fitness for duty report from Head to Caraccio on

December 13, 2013; and that Caraccio contacted Farkas to schedule an appointment regarding his fitness for duty that very same day.

I also **FIND** that Caraccio was informed Farkas was on vacation and that the soonest he could see Farkas was sometime before January 11, 2014; that he saw Farkas in early January 2014; that he received the note from Farkas by email on January 11, 2014; and that he forwarded the note by email to his attorney and Ahmad that very same day too.

Indeed I **FIND** that Caraccio forwarded the note to Ahmad by email "immediately" and that he used the email address Ahmad had provided in her letter.

More important, I **FIND** that Hudson County had not established a timetable for Caraccio or Farkas to provide the note regarding Caraccio and his fitness for duty; that Hudson County had not established a timetable for Caraccio to return to duty, either before or after it received the note; and that Ahmad had no concern whatsoever about when she even received the note from Caraccio or Farkas about his fitness for duty, let alone when Caraccio returned to duty.

V.

In short, I **FIND** that Hudson County has failed to prove by a preponderance of the evidence any of the specifications contained in its Final Notice of Disciplinary Action.

DISCUSSION AND CONCLUSIONS OF LAW

In appeals concerning major disciplinary action, the appointing authority bears the burden of proof. N.J.A.C. 4A:2-1.4(a). The burden of proof is by a preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), and the hearing is de novo, Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980). On such appeals, the Civil Service Commission may increase or decrease the penalty, N.J.S.A. 11A:2-19, and the concept of progressive discipline guides that determination, In re Carter, 191 N.J. 474, 483-86 (2007).

Since I found that Hudson County has failed to prove by a preponderance of the evidence any of the specifications contained in its Final Notice of Disciplinary Action, I **CONCLUDE** that Hudson County has failed to prove by a preponderance of the evidence any of the charges in its Final Notice of Disciplinary Action and that this case against Caraccio should be dismissed.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that this case against Caraccio be **DISMISSED**; that Caraccio be returned to his position of correction officer and be awarded back pay from the effective date of his removal pending the outcome of the previous case against him; and that Caraccio be awarded full counsel fees and all costs related to this case.

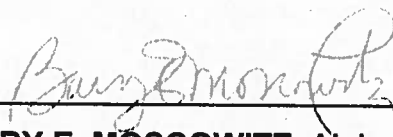
I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

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.

November 3, 2014

DATE


BARRY E. MOSCOWITZ, ALJ

Date Received at Agency:

November 3, 2014

Date Mailed to Parties:

November 3, 2014

dr

APPENDIX

Witnesses

For Petitioner:

Thomas Caraccio

For Respondent:

Kalimah Ahmad

Documents

For Petitioner:

P-1 Not in evidence

P-2 Not in evidence

For Respondent:

C-1(a) Final Notice of Disciplinary Action dated June 16, 2014

C-1(b) Preliminary Notice of Disciplinary Action dated April 1, 2014

C-2 Report by William Head, Jr., M.D. dated December 2, 2014

C-3 Letter from Ahmad to Caraccio dated December 13, 2014

C-4 Letter from Head to Hudson County dated March 20, 2014

C-5(a) Email from Caraccio to Hudson County dated March 20, 2014

C-5(b) Letter from Edward Farkas, M.D. to Whom It May Concern dated January 11, 2014

C-6 Letter from Head to Hudson County dated April 9, 2014

C-7(a) Final Notice of Disciplinary Action dated October 10, 2013

C-7(b) Decision from Departmental Hearing dated June 16, 2014, including disciplinary history