



appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In his initial decision, the ALJ set forth the following facts. On December 22, 2013, the appellant was assigned to General Population Unit F3E. The appellant left his post to use the bathroom from 6:28 a.m. to 7:36 a.m. without notifying his supervisors. During his absence, three inmates entered the cell of another inmate and began to fight. However, the appellant did not report the incident, later stating that he was in the bathroom at that time ill with a stomach virus. Later that afternoon, the appellant reported a second fight with the same exact inmates. The initial incident went unreported until Lieutenant A. Fleming reviewed the video surveillance as part of his investigation of the second incident. In upholding the charges, the ALJ rejected the appellant's argument that the bathroom was part of his assigned unit. The ALJ noted that to find an officer's absence for more than an hour excusable simply because the bathroom may be part of his post, strained credibility and casts doubts on the appellant's ability to exercise good judgment. Based on the foregoing, the ALJ concluded that the appellant neglected his duty. The charge of falsification was dismissed as no evidence was presented to support it. However, the ALJ concluded that removal was unwarranted based on the appellant's unblemished record and his contention that he was suffering from an illness on the day in question. Therefore, the ALJ modified the removal to a six-month suspension.

In its exceptions, the appointing authority argues that given the egregious nature of the appellant's misconduct, removal is the only appropriate remedy. In this regard, the appointing authority asserts that the appellant's conduct in leaving his assigned post for 68 minutes endangered the inmates and correctional personnel. Thus, the appellant's misconduct warrants removal, regardless of his clean disciplinary record. The appointing authority notes that the appellant's actions in leaving his post without notifying his supervisors left inmates in a position of potential harm and resulted in a fight taking place. His presence at the initial fight or a call for a replacement could have prevented the second fight.

In the appellant's cross exceptions, he reiterates that there is great ambiguity regarding the protocol for relief when an officer uses the bathroom. Moreover, the appellant stresses that removal would be disproportionate to the offense in light of all the circumstances. Specifically, he points to his pristine disciplinary history and he maintains that his alleged conduct was not willful or intentional but rather the result of a medical emergency. As such, he contends that a suspension of less than six months is the appropriate penalty.

Upon its *de novo* review, the Commission agrees with the ALJ regarding the charges. However, it disagrees with the ALJ's assessment of the penalty. In determining the proper penalty, the Commission's review is *de novo*. In addition to

its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 N.J.A.R. 2d (CSV) 463. Moreover, 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. See *Henry v. Rahway State Prison*, 81 N.J. 571 (1980). It is settled that the theory of progressive discipline is not "a fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. See *Carter v. Bordentown*, 191 N.J. 474 (2007). Lastly, Correction Officers, like municipal Police Officers, hold highly visible and sensitive positions within the community and are therefore, subject to a higher standard of conduct and responsibility than what is required of other public employees. See *Moorestown v. Armstrong*, 89 N.J. Super. 560 (App. Div. 1965), cert. denied, 47 N.J. 80 (1966). See also *In re Phillips*, 117 N.J. 567 (1990).

In the instant matter, it must initially be noted that the appellant's actions were egregious. In this regard, it is undisputed that the appellant left his assigned post for a period of 68 minutes to use the bathroom without notifying his supervisors. During this time, three inmates entered the cell of another inmate and a fight broke out. The appellant made no attempt to be properly relieved, notwithstanding testimony indicating his possession of a radio. The appellant's argument that the bathroom was part of his assigned post is unpersuasive. If he was truly in the bathroom for 68 minutes as part of a medical emergency, he certainly would not have been doing his duties at that time. His absence for over an hour created an extreme safety issue for other inmates and for correctional personnel. Appellant's argument for progressive discipline is equally unpersuasive. The misconduct is particularly egregious in light of the fact that the appellant is a law enforcement officer and as such, is held to a higher standard. While the appellant has no prior discipline in his five years of experience, his obligation is to ensure the safety and security of inmates and correctional personnel. His conduct fell woefully short of that standard. Accordingly, given the egregious nature of appellant's misconduct, the Commission finds that the foregoing circumstances provide a sufficient basis to uphold the removal.

### ORDER

The Civil Service Commission finds that the appointing authority's action in removing the appellant was justified. Therefore, the Commission affirms that action and dismisses the appellant's appeal.

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  
THE 4<sup>TH</sup> DAY OF FEBRUARY, 2015

*Robert M. Czech*

Robert M. Czech  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Henry Maurer  
Director  
Division of Appeals and Regulatory Affairs  
Civil Service Commission  
P.O. Box 312  
Trenton, NJ 08625-0312

Attachment

c: John Restrepo  
Charles J. Sciarra, Esq.  
Christopher Kurek



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

**INITIAL DECISION**

OAL DKT. NO. CSR 02830-14

2014-2092

**IN THE MATTER OF JOHN RESTREPO,  
NORTHERN STATE PRISON.**

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**Charles J. Sciarra, Esq.**, for appellant John Restrepo (Sciarra & Catrambone, LLC, attorneys)

**Christopher Kurek**, Deputy Attorney General, for respondent Northern State Prison (John Jay Hoffman, Attorney General of New Jersey, attorney)

Record Closed: June 23, 2014

Decided: November 25, 2014

BEFORE **JEFFREY A. GERSON**, ALJ:

**STATEMENT OF THE CASE**

John Restrepo was a Senior Corrections Officer (SCO) at Northern State Prison (NSP) who was terminated from his position on or about February 22, 2014 as a result of an incident that took place at the prison on or about December 22, 2013.

The Preliminary Notice of Disciplinary Action dated February 3, 2014 described the incident giving rise to the charge as follows:

“On Sunday, December 22, 2013 you were assigned to General Population Unit F3E on first shift. You left your post at 6:28 a.m. and didn't return until 7:36 a.m. during which time there was a reported altercation between inmates. Further, you again left your post at 11:49 a.m. and returned at 12:18 p.m. at the exact same time that the same inmates from the morning altercation began to fight in the unit dayroom and a shank was involved. Further, during the investigation you provided false information to the Department”.

As a result of this incident SCO Restrepo was charged with incompetency, inefficiency, failure to perform duties, conduct unbecoming a public employee, and neglect of duty.

A hearing was held on June 9, 2014 and the record closed on June 30, 2014.

### **TESTIMONY AND FACTS**

Testifying on behalf of Northern State Prison was Lt A. Fleming and Major Michael Chrone.

Lt. Fleming was assigned to investigate a fight between inmates which took place on December 22, 2013. Lt. Fleming's viewing of the video of the date in question revealed that a fight involving inmates in between 6:28 a.m. and 7:36 a.m. took place on the unit to which SCO Restrepo was assigned. This incident went unreported because SCO Restrepo told Lt. Fleming that at the time of the incident, he was in the restroom allegedly suffering from a stomach virus.

Lt. Fleming testified that the procedure for an officer when he needs to be relieved to use the bathroom is for him to call a supervisor and request a break. Lt. Fleming made reference to the Department of Corrections Law Enforcement Personnel Rules and Regulations which indicates that officers should not leave their assigned post unless properly relieved by another officer. According to Lt. Fleming, SCO Restrepo did not obtain permission from a supervisor prior to leaving his post to use the bathroom.

There is no dispute that for a period of time of approximately 68 minutes SCO Restrepo was not at his assigned location and that during those 68 minutes three inmates entered the cell of another inmate and a fight occurred.

Major Crone testified that an officer is not to leave his assigned post or unit without notifying a supervisor. In the event of an emergency requiring an officer to leave his assigned post quickly, officers are equipped with radios to inform their supervisors that they had to leave a post and that assistance was needed.

### **FINDINGS**

The facts in this matter are not in dispute. The following recitation of the facts from the summation of the Deputy Attorney General, were established at the hearing by a preponderance of the evidence and I adopt them as my **FINDINGS OF FACT** in this matter.

SCO Restrepo admitted to leaving his post in the F3E unit for a period of 68 minutes on December 22, 2013 to use the bathroom in the LCP. Both the Custody Post Orders and LePRR provide that any time an officer needs to leave his assigned post, it is necessary to contact the officer's supervisor to request permission or be properly relieved. As a result, during his absence, three inmates entered the cell of another inmate and began to fight. This fight was not reported, and was not discovered until Lt. Fleming conducted his investigation and reviewed the video surveillance of the F3E unit for December 22, 2013. Later that same day, the same exact inmates were involved in a second fight, which was seen and reported by SCO Restrepo. The second fight may have been prevented had SCO Restrepo been on his assigned post and either witnessed the first altercation or his presence may have prevented the fight from occurring in the first place. By failing to contact a supervisor prior to leaving his post, SCO Restrepo failed and neglected his duties to protect the inmates whom he was responsible to oversee. This failure resulted in inmates fighting, which created a danger to all of the inmates in the F3E unit. SCO Restrepo violated NSP Custody Post Orders and the DOC Law Enforcement Personnel Rules and Regulations when he went to the

bathroom without first obtaining permission or being properly relieved.

Restrepo argues that the bathroom was part of his assigned unit and as such, the policy regarding bathroom breaks is unclear. This argument is at best pretextual and in the context of a prison environment simply unconvincing. Whether or not, technically, the bathroom is part of the assigned portion of Restrepo's responsibility is essentially irrelevant. Even if the bathroom is part of Restrepo's assigned responsibility, his absence from his post for more than one hour while he was in the bathroom prevented him from making observations which he clearly should have been making and further led to altercations between inmates which in the second incident could have been prevented had the first incident been observed. To argue that an officer's absence for more than a hour is excusable by virtue of the fact that he is in the bathroom that might be part of his post strains credulity and casts some doubt with respect to SCO Restrepo's ability to exercise good judgment.

The factual findings in this matter lead to the inescapable conclusion that on the date in question SCO John Restrepo neglected his duty in violation of N.J.A.C. 4A:2-2.3(a)(7). The charge of falsification is dismissed as no evidence was presented to support it.

#### PENALTY

SCO Restrepo was hired on March 25, 2008. His work history reflects no prior discipline, but does show a commendation received in May 2013.

SCO Restrepo dereliction in this matter is mitigated both by his unblemished record and his contention that he was suffering from illness on the day in question. Although the magnitude of SCO Restrepo's negligence in performing his duties is serious, the absence of any prior discipline should temper the penalty and I **CONCLUDE** that termination is unwarranted. Though termination is not warranted, a six month suspension is. The dereliction here was serious, but based on past performance termination is too severe a penalty.



**ORDER**

It is **ORDERED** that John Restrepo be suspended for six months.

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, 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 25, 2014



\_\_\_\_\_  
DATE

\_\_\_\_\_  
**JEFFREY A. GERSON, ALJ**

Date Received at Agency:

November 25, 2014

Date Mailed to Parties:

11/25/14

sej

**APPENDIX**

**WITNESSES**

**For Appellant:**

None

**For Respondent:**

Lieutenant A. Fleming  
Major Michael Chrono

**EXHIBITS IN EVIDENCE**

**For Appellant:**

None

**For Respondent:**

- R-1 2/20/14 FNDA (DOC 89)
- R-2 2/3/14 PNDA (DOC 1 to DOC 2)
- R-4 SCO Restrepo Work History (DOCS)
- R-6 Incident Investigation and Report by Lt. Fleming (DOC 15 to DOC 18)
- R-7 12/31/13 SCO Restrepo Interview Questions (DOC 19 to DOC 21)
- R-8 Restrepo Prescription (DOC 22)
- R-10 1/24/14 SCO Restrepo Interview Questions (DOC 25)
- R-15 NSP Custody Post Orders (DOC 92 to DOC 111)
- R-16 DOC Law Enforcement Personnel Rules & Regulations (DOC 112 to DOC 133)