STATE OF NEW JERSEY

In the Matter of Nolan Cox

CSC Docket No. 2013-116
OAL Docket No. CSV 9963-12

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: DEC 17 2014 (JET)

The appeal of Nolan Cox, a former County Correction Officer[1] with Mercer County, Department of Public Safety, of his 45 working day suspension, on charges, was heard by Administrative Law Judge Ronald W. Reba (ALJ), who rendered his initial decision on October 22, 2014. Exceptions were filed on behalf of the appointing authority, and cross exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on December 3, 2014, did not adopt the ALJ's recommendation to modify the 45 working day suspension to a five working day suspension. Rather, the Commission upheld the 45 working day suspension.

DISCUSSION

The appellant was suspended for 45 working days on charges of conduct unbecoming an employee, other sufficient cause, falsification, neglect of duty, loafing, idleness or willful failure to devote attention to tasks which would result in danger to persons or property and violation of administrative procedures and/or regulations involving safety and security. Specifically, the appointing authority asserted that the appellant failed to make required security checks while on duty and falsified his logbook by recording that the security checks were made. Upon the

[1] The appellant retired effective November 30, 2012.

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

Based on the testimony, the ALJ found that the appellant was assigned as the "B-Pod" second-floor living-unit officer at the time of the February 27, 2012 incident. Pursuant to the appointing authority's Standard Operating Procedures (SOPs) 238 and 240, living-unit officers are required to perform inmate security checks at least every 30 minutes during their shift. County Correction Captain Richard Bearden testified that he reviewed a video of the February 27, 2012 incident and determined that the appellant failed to make the required security checks every 30 minutes, yet he had recorded in his logbook that he performed the security checks. Bearden also testified that he directed the appellant to prepare a report regarding the February 27, 2012 incident after the Preliminary Notice of Disciplinary Action (PNDA) for the instant matter was issued on April 4, 2012. The appellant testified that he believed his visual checks were sufficient and he correctly entered the security checks into his logbook. However, the appellant acknowledged that that he did not perform the security checks on 30 minute intervals.

The ALJ concluded that the appellant did not purposely falsify the logbook since he believed that his visual security checks were sufficient. However, the ALJ found that the appellant did not perform security checks every 30 minutes as required by SOPs 238 and 240. Thus, the ALJ sustained the charges of neglect of duty, failure to devote attention to tasks, violation of administrative procedures involving safety and security, other sufficient cause and conduct unbecoming a public employee. Regarding the penalty, the ALJ found that since the appointing authority took no corrective disciplinary action until its issuance of disciplinary charges against the appellant over a month after the incident, it did not consider the appellant's actions egregious. Accordingly, he recommended modifying the penalty to a five working day suspension.

In its exceptions, the appointing authority maintains that the appellant falsely indicated that he performed the security checks in his logbook. The appointing authority also contends that the appellant failed to perform security checks every 30 minutes during his shift as required and that there was no dispute that he was aware that he was required to perform them. Moreover, it emphasizes that there was no dispute that the appellant listed "all secure" next to several entries in the logbook despite that the checks were inappropriately conducted. Additionally, the appointing authority requests that the Commission increase the penalty beyond the originally imposed 45 working day suspension due to the nature of the infraction and in accord with *In the Matter of Jose Castillo,* (MSB, decided December 19, 2007).

In response, the appellant argues that the ALJ's recommendation to reduce the penalty was correct. Specifically, the appellant contends that there is

insufficient evidence to show that he falsified the logbook as he believed that his visual checks were sufficient. Additionally, the appellant avers that he continued to work for three months after the incident occurred without any idea that he was failing to comply with proper procedures. Therefore, the appellant argues that the five working day suspension is appropriate and that it would be inappropriate to increase the penalty beyond the 45 working day suspension in light of the circumstances presented.

Upon independent review of the entire record, including the exceptions and cross exceptions filed by the parties, the Commission does not agree with the ALJ's determination regarding the charge of falsification. Further, the Commission does not agree with the ALJ's determination to modify the 45 working day suspension to a five working day suspension. Rather, for the reasons discussed below, the Commission upholds the charges and the 45 working day suspension.

The Commission is not persuaded by the appellant's argument that the visual security checks he conducted were adequate to satisfy the policies established by the facility. The appellant's belief that the visual checks were sufficient is not reasonable as he acknowledged that SOP 238 requires the living-unit officer to get up and perform security checks at least every 30 minutes. Based on this testimony, the Commission finds that the appellant was aware that SOPs 238 and 240 required him to physically perform the security checks at least every 30 minutes. The fact that he did not do so and then failed to accurately document the security checks in the logbook supports sustaining the charge of falsification.

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 (1980).

The ALJ's recommendations to reduce the penalty is based in part on his perception that if the appointing authority believed that the appellant's actions were so egregious, it should have acted immediately to ensure the safety and

security of the institution by either informing the appellant that he must do proper security checks or immediately suspending him. The Commission disagrees. The failure to properly perform the required security checks by not physically patrolling the living unit is a very serious infraction as failure to do so could result in a breach of security and danger to inmates and employees. Further, while the appointing authority may have taken an extended period of time to bring forth the charges against the appellant, such a delay does not mitigate the seriousness of the misconduct or provide a valid basis to lessen the penalty.

As noted earlier, the Commission's review of a penalty is *de novo*, and, based on the serious misconduct and the appellant's disciplinary history, which includes a 10 working day suspension in 2009, the 45 working day suspension is appropriate. The Commission would come to this conclusion even if the falsification charge was not sustained, since the potential public safety implications that could result from the failure to adequately conduct security checks is significant. The Commission emphasizes that County Correction Officer is a law enforcement officer who, by the very nature of his or her job duties, is held to a higher standard of conduct than 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). Finally, the appointing authority's reliance on *Castillo, supra,* to argue for an increase to the originally imposed penalty is misplaced. The facts in *Castillo* are distinguishable from the instant matter as that case did not involve the Commission increasing a penalty that was originally imposed by the appointing authority. Rather, that matter involved a removal from employment where the ALJ recommended modifying the removal to a 30 day suspension but the former Merit System Board imposed a six-month suspension. In contrast, the facts of this matter involve a 45 working day suspension. In this regard, if the appointing authority believed the appellant's misconduct was so egregious, it should have *initially* imposed a greater penalty. Thus, no basis exists to increase penalty beyond the 45 working day suspension. Accordingly, the Commission concludes that the penalty imposed by the appointing authority is neither unduly harsh nor disproportionate to the offense and there is sufficient basis to uphold the appellant's 45 working day suspension.

ORDER

The Civil Service Commission finds that the action of the appointing authority in imposing a 45 working day suspension was justified. Therefore, the Commission affirms that action and dismisses the appeal of Nolan Cox.

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 3rd DAY OF DECEMBER, 2014

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 9963-12
AGENCY DKT. NO. 2013-116

IN THE MATTER OF NOLAN COX,
MERCER COUNTY DEPARTMENT
OF PUBLIC SAFETY.

Stuart J. Alterman, Esq., for appellant Nolan Cox (Alterman & Associates, attorneys)

Kristina E. Chubenko, Assistant County Counsel, for respondent Mercer County Department of Public Safety (Arthur R. Sypek, Jr., County Counsel, attorney)

Record Closed: June 16, 2014 Decided: October 22, 2014

BEFORE **RONALD W. REBA**, ALJ:

STATEMENT OF THE CASE

Respondent, Mercer County Department of Public Safety (hereinafter appointing authority), brings this disciplinary action against appellant, Nolan Cox. The appointing authority alleges that appellant, a County correction officer (hereinafter CO), committed conduct unbecoming, falsification, neglect of duty and violation of departmental rules and/or regulations.

PROCEDURAL HISTORY

On or about April 4, 2012, Mercer County served appellant with a Preliminary Notice of Disciplinary Action (PNDA) dated April 4, 2012, in accordance with N.J.A.C. 4A:2-2.5(a). The County sought a forty-five-working-day suspension. The PNDA charged appellant with violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause, specifically, falsification: intentional misstatement of material fact in connection with work, employment, application, attendance, or in any record report, investigation, or other proceeding (C-8); neglect of duty, loafing, idleness or willful failure to devote attention to tasks which would result in danger to persons or property (B-2); and violation of administrative procedures and/or regulations involving safety and security (D-6), particularly, SOP 238 and SOP 240.

According to respondent, the appellant failed to request a departmental hearing. Appellant denies receiving notice of the PNDA. On or about July 2, 2012, the County served appellant with a Final Notice of Disciplinary Action (FNDA) dated June 27, 2012, notifying him of his suspension for forty-five days effective July 9, 2012. Appellant timely appealed the FNDA with the Civil Service Commission, which transferred the matter to the Office of Administrative Law (OAL) on July 25, 2012, for a de novo hearing. I heard the matter on February 1, 2013, July 31, 2013, and February 11, 2014. I closed the record on June 16, 2014, after receipt of post-hearing submissions. The time for issuance of the Initial Decision was extended for good cause.

TESTIMONY

Captain Richard Bearden

Richard Bearden has been employed as a captain with the appointing authority since November 2004, having begun working as a CO in September 1990. One of Captain Bearden's duties is taking care of disciplinary matters. He prepared the disciplinary charges in this matter.

Captain Bearden testified that on February 27, 2012, appellant was working as the B-Pod second-floor living-unit officer on A-Tour, which is 11:00 p.m. to 7:00 a.m. B-Pod is the unit for maximum-security inmates, and consists of two separate living units, first-floor and second-floor. There is an officer assigned to each floor. The living-unit officer sits at a desk, and on the officer's desk is a telephone. Bearden testified that because there are no monitors or cameras, in order for the living-unit officer to perform a security check on inmates, the officer has to physically walk past each cell and look inside to see the inmates. The inmates are in three-person cells. He said that during A-Tour, the inmates should be asleep in their beds. He emphasized that the security checks are performed for the safety and security of the inmates; the staff makes sure that inmates are safe in their cells, no one is in medical distress, there are no fights, and no one is trying to dig their way out.

The living-unit officer is required to abide by Standard Operating Procedure (SOP) 240, "Post Orders—Living Unit Post Orders." (R-4.) SOP 240 section F, entitled "Responsibility," at paragraph 4 states: "Correction Officers will conduct and document Counts on the Living Units at the following specified times . . . and account for each inmate every 30 minutes from 10:00 p.m. to 6:00 am." Further, section F, paragraph 32, provides that

> [t]he Living Unit Officer is required to make regular patrols of the Living Unit for the purposes of security and inspection. Security checks will be made AT LEAST every 30 minutes in all areas of the Living Unit and surrounding areas as directed by specific post orders. Security checks will be logged in the Living Unit Log Book. All locking mechanisms, doors, windows, bars, ventilation coverings etc. will be inspected with regularity and discrepancies brought immediately to the attention of the area supervisor.

Captain Bearden stated that generally during A-Tour there is not much activity, so the living-unit officer's main requirement is to perform security checks every thirty minutes.

Captain Bearden testified that this matter originated when on or about February 28, 2012, the Property and Insurance office requested that Captain Bearden review video footage for B-Pod from February 27, 2012. Specifically, the acting lieutenant had reported that she had been injured by walking up the steps between A-Pod and B-Pod, and Property and Insurance wanted to know if the accident had been recorded on the cameras for those living units. In reviewing the footage from the video camera located on B-Pod, Captain Bearden noticed that appellant had failed to make almost all of his security checks. This concerned Bearden, because appellant was not doing his job, in that he was failing to adhere to the SOP and failing to ensure a safe and secure environment for the inmates.

Captain Bearden testified that B-Pod, second floor, has thirteen cells, and during A-Tour the living-unit officer has very few obligations other than performing the required security checks, as the inmates should be asleep. Captain Bearden reviewed the logbook entries for that date. The entries that appellant authored indicated that the unit was "all secure" at the following times: 11:34, 12:10, 12:34, 1:08, 2:30, 3:05, 2:00, 2:33, 3:06, 3:30, 4:08, 4:25, 5:06, 5:33, 6:30. (R-3.) Captain Bearden testified that the video footage reviewed revealed that appellant only performed three security checks during his entire shift, at 2:20, 5:53 and 6:30. Captain Bearden explained that from the officer's desk, the officer is only able to see six of the thirteen cells, as the living unit is L-shaped and there is a fence/gate between two groups of cells. In addition, Bearden asserted that the living-unit officer cannot see into the cells from the desk, as the cell doors are not constructed of bars, but rather are solid doors with windows. Captain Bearden also issued a memorandum dated March 23, 2012, detailing this information. (R-2.)

Captain Bearden testified that he charged appellant with falsification, because appellant made false entries in his logbook by way of recording security checks that he had failed to perform. Falsification is found on the Mercer County Table of Offenses and Penalties (R-6) at section C-8, and this was appellant's first C-8 infraction. He also charged appellant with neglect of duty or willful failure to devote attention to task which would result in causing danger to persons or property, Step 2, because appellant failed

to make security checks and follow procedures on the unit. Neglect of duty is found on the Mercer County Table of Offenses and Penalties at section B-2, and this was appellant's second B-2 infraction. A second B-2 offense carries a penalty ranging from forty-five days' suspension to removal. Captain Bearden testified that he also charged appellant with violation of administrative procedures and/or regulations involving safety and security, because he violated SOP 238, entitled "Post Orders—Correction Officer (General)." Violation of administrative procedures and/or regulations is found on the Mercer County Table of Offenses and Penalties at section D-6, and this was appellant's first D-6 infraction. Specifically, Captain Bearden testified that the following sections of SOP 238 were violated:

> Alertness, attention to duty and constant attentiveness are your best protection. Never relax your vigilance and do not leave your assigned post unless you have been properly relieved. [R-5 at 2.]
>
> Correction Officers will enforce all rules and regulations within the institution, and, after approval from a supervisor, initiate disciplinary procedures against inmates. [R-5 at 3.]
>
> Correction Officers will make appropriate log entries of daily activities in the Log Book for their assigned Post. [R-5 at 3.]
>
> Officers will be familiar with, and enforce, all security procedures and policies to assure the safe confinement of inmates committed to the Correction Center. [R-5 at 4.]
>
> Correction Officers will conduct and document Counts on the Living Units at the following specified times . . . and account for each inmate every 30 minutes from 10:00 p.m. to 6:00 a.m. [R-5 at 5.]

Captain Bearden asserted that "accounting" for each inmate during the evening hours means physically looking inside each cell. He testified that appellant's disciplinary history consisted of an FNDA dated July 29, 2009, which imposed a penalty of a ten-day suspension/fine for a B-2 infraction of neglect of duty which would result in danger to persons or property; an FNDA dated September 30, 2011, which imposed a penalty of an official written reprimand for an A-6 attendance infraction; and an FNDA dated April 30, 2012, which imposed a penalty of an official written reprimand for a B-1

infraction of neglect of duty which would not result in causing danger to persons or property. (R-7; R-8; R-9.) Captain Bearden testified that, in accordance with appointing-authority practice, the PNDA in the instant matter was served on appellant via regular and certified mail. Appellant failed to accept the certified mail, but the regular mail was not returned to the County. Appellant did not make a request for a departmental hearing and, therefore, the FNDA was issued. Captain Bearden further testified that the FNDA was also served on appellant via regular and certified mail. In addition, appellant received a copy via hand-delivery, as acknowledged by appellant's signature and date on the FNDA.

On cross-examination, Captain Bearden confirmed that up to the day of the video or thereafter, he had not been aware of any complaints made against appellant by any of his immediate supervisors. Bearden also confirmed that he did not talk to Cox or to any of the officer's supervisors about what he saw on the videotape, so as to correct the conduct of the living-unit officer on B-Pod. He acknowledged that when he called Cox on April 12, 2012, and directed that he make a report about his logbook, he did not inform the appellant of his violation of SOP 238 (PNDA issued on April 4, 2012), or instruct him to correct his mistakes. He also admitted that his records showed that Cox remained at the same post without anyone following up as to whether his violations were corrected until he retired several months later, and to his knowledge Cox's handling of his post never changed.

Nolan Cox

Appellant testified on his own behalf. He is currently retired from his employment with the County, where he worked as a correction officer for approximately twenty years. Appellant testified that he "bid into" the B-Pod living-unit post for A-Tour, and he was the only second-floor living-unit officer on that post. There are thirteen cells on the second floor of B-Pod. Appellant testified that the living-unit officer's desk is all the way at the end of the hall, and when he's seated at the desk he can only see the cells in front of him; he has to walk the tier to see the rest of the cells. He recalls the evening of February 27, 2012, because that was his birthday, and the unit was quiet and secure

and it was a good night. Nothing out of the ordinary happened during that shift. Appellant testified that sometimes inmates do things in their cells like make makeshift knives, and the living-unit officer should surprise them by not sticking to an exact thirty-minute security-check schedule. He said that the inmates in his pod were housed in his unit for a long time, and he got to know them.

Appellant acknowledged that SOP 238 requires the living-unit officer to get up and perform security checks at least every thirty minutes. He acknowledged that on February 27, 2012, he did not perform security checks every thirty minutes, but he believed that he could accomplish the same purpose by doing a visual check, as the unit was quiet and secure. Appellant stated that he made the entries in the logbook because he believed his visual checks and walk-through security checks were adequate. On April 11, 2012, he received a telephone call from Captain Bearden while he was working an overtime assignment at a hospital, and he was told to write an incident report about what happened on February 27, 2012. Appellant testified that it was unclear to him what he should address in his report, as he did not have an opportunity to review the logbook prior to writing the incident report.

Appellant claimed that he had not received a copy of the PNDA or FNDA prior to learning from his supervisor, Lieutenant Kownacki, that he was suspended. He testified that the first time he became aware that he was to serve a forty-five-day suspension beginning July 9, 2012, was when a supervisor informed him at line-up that he was not supposed to be at work, but home serving a suspension. However, on cross-examination appellant acknowledged that it was his signature on the FNDA, and it appeared to be his writing in the "date received" section. He agreed that the date received read "7/2/12," and that his suspension did not begin until July 9, 2012.

FACTUAL DISCUSSION

After reviewing all the documentation and hearing the testimony of the witnesses, I **FIND** the following as **FACT**.

On February 27, 2012, appellant, a twenty-year correction officer, was working as the B-Pod second-floor living-unit officer. Pursuant to Standard Operating Procedures, living-unit officers are required to perform security checks of the inmates at least every thirty minutes. Captain Richard Bearden, who is in charge of discipline, reviewed a video recording from appellant's February 27, 2012, shift while investigating an unrelated matter. He found that appellant had failed to make the required thirty-minute security checks while on duty on his assigned living unit, and had distorted his logbook by recording that he had performed security checks, when in fact he had not followed the protocols set forth in SOP 238 and SOP 240. A month and a half later, on April 11, 2012, Captain Bearden called Cox and directed him to prepare an incident report for February 27, 2012; this was after the PNDA was issued on April 4, 2012.

On the date in question appellant did not perform security checks every thirty minutes as required by SOP 238 and SOP 240. He testified that he believed that his limited visual checks were sufficient, and thus entered them into the logbook. No one immediately expressed dissatisfaction with this procedure, even after Captain Bearden viewed a video recording of the shift the next day. I therefore cannot find that appellant purposely falsified his logbook. As far as appellant's assertion that he did not have notice of the charges and suspension, even giving appellant the benefit of the doubt as to whether he received the PNDA dated April 4, 2012, he certainly received the FNDA dated June 27, 2012. He acknowledged that it was his signature on the FNDA indicating receipt, and that it appeared to be his writing indicating the date received of July 2, 2012.

CONCLUSIONS OF LAW

Civil service employees' rights and duties are governed by laws including the Civil Service Act and the regulations promulgated thereunder. A civil service employee who commits a wrongful act related to his employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2.

The appointing authority shoulders the burden of establishing the truth of the allegations by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Here, appellant has been charged with violations of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause: falsification (C-8); neglect of duty (B-2), Step 2; and violation of administrative procedures and/or regulations involving safety and security (D-6), specifically, SOP 238 and SOP 240, post orders.

Appellant has been employed by the appointing authority for more than twenty years. He made no assertion that he was not familiar with the SOPs. Further, he acknowledged that from his post he could only see the cells directly in front of him, and that to do a security check he had to walk around the unit, which admittedly he did not do at thirty-minute intervals. I **CONCLUDE** that the violations of sections B-2, neglect of duty, and D-6, administrative procedures and/or regulations involving safety and security, of the Mercer County Table of Offenses and Penalties have been proven. As stated above, I cannot conclude that appellant is guilty of falsification if he truly believed that the checks he logged in the logbook were sufficient.

"Conduct unbecoming a public employee" is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A. 2d 821, 825 (1959)). Such

misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

The violations comprising the other-sufficient-cause charge are part and parcel of the charge of conduct unbecoming. Consequently, I **CONCLUDE** that appellant's conduct constitutes conduct unbecoming a public employee.

In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). However, where the charged dereliction is an act which, in view of the duties and obligations of the position, substantially disadvantages the public, good cause exists for removal. See Golaine v. Cardinale, 142 N.J. Super. 385 (Law Div. 1976), aff'd, 163 N.J. Super. 453 (App. Div. 1978); In re Herrmann, 192 N.J. 19 (2007).

The County submitted evidence of appellant's prior disciplinary history. He had one prior major disciplinary action, resulting in a ten-day suspension in 2009 for a section B-2 violation, and two subsequent written reprimands on charges of violation of other sections of the Mercer County Table of Offenses and Penalties. (R-7; R-8; R-9.)

The charges against appellant are serious, and respondent seeks major disciplinary action. However, respondent neither discussed with appellant his failure to perform the required security checks nor brought disciplinary charges until months after the video of appellant's February 27, 2012, shift was viewed. It is troubling that Captain Bearden knew of appellant's failure to abide by SOP 238 and SOP 240 as of February

28, 2012, yet respondent took no corrective or disciplinary action until its issuance of the PNDA on April 4, 2012, and ultimate suspension of appellant effective July 9, 2012. Appellant showed up for work until he was told that he shouldn't be there, but out serving a suspension. Respondent seeks to impose a significant forty-five-day suspension, yet seemingly did not consider appellant's actions so egregious that it acted immediately to ensure the safety and security of the institution by either informing appellant that must do the security checks as dictated by SOP 238 and SOP 240, or immediately suspending him for not following SOP 238 and SOP 240.

I **CONCLUDE** that the discipline imposed by the appointing authority is too harsh under the circumstances, and that a five-day suspension is appropriate.

ORDER

Based on the above findings and conclusions, I hereby **ORDER** that the forty-five-working-day suspension imposed by the appointing authority is **MODIFIED** to a five-day suspension.

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, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO 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.

October 22, 2014
DATE

Ronald W. Reba
RONALD W. REBA, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/cad

WITNESSES

For Appellant:

Nolan Cox

For Respondent:

Richard Bearden

EXHIBITS

For Appellant:

P-1 Report of Nolan Cox

For Respondent:

R-1 Final Notice of Disciplinary Action, dated June 27, 2012
R-2 Report of Captain Bearden
R-3 Handwritten notes on A-Tour
R-4 SOP Manual—240
R-5 SOP Manual—238
R-6 Mercer County Public Safety Table of Offenses and Penalties
R-7 Final Notice of *Major* Disciplinary Action, dated June 29, 2009
R-8 Final Notice of Minor Disciplinary Action, dated September 30, 2011
R-9 Final Notice of Minor Disciplinary Action, dated April 30, 2012