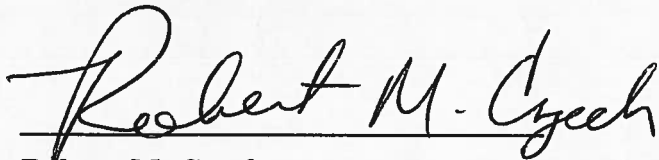


Re: Dawn Giddens

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
DECEMBER 3, 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. CSV 10783-13

AGENCY DKT. NO. 2014-226

**IN THE MATTER OF DAWN GIDDENS,
MERCER COUNTY DEPARTMENT OF
PUBLIC SAFETY.**

David Beckett, Esq., for appellant Dawn Giddens (Mets Schiro & McGovern, LLP, attorneys)

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

Record Closed: July 22, 2014

Decided: October 20, 2014

BEFORE **JOSEPH A. ASCIONE**, ALJ:

STATEMENT OF THE CASE

On July 19, 2013, appellant, correction officer Dawn Giddens (Giddens), timely appealed her July 13, 2013,¹ fifteen-day suspension by the Mercer County Department of Public Safety Correction Center on charges of violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming an employee, and N.J.A.C. 4A:2-2.3(a)(12),² other sufficient

¹ The dates identified are those dates submitted with transmittal from the Civil Service Commission. The dates of the notices of disciplinary action are the dates appearing on those documents.

² Amended by R.2012 d.056, effective March 5, 2012; recodified former (a)(11) as (a)(12).

cause: violation of administrative procedures and/or regulations involving safety and security (D-6), SOP 004 & SOP 238, Step 2, specifically, leaving grounds without authorization and without being properly relieved on April 4, 2010. Appellant denies leaving her post without authorization, and maintains that she had approval from her supervisor to leave because of illness.

PROCEDURAL HISTORY

On April 15, 2010, a Preliminary Notice of Disciplinary Action (PNDA) (R-2) was issued against Giddens, with the specifications identified above. Giddens received her disciplinary hearing on the PNDA. The charges were sustained, and on June 28, 2013, a Final Notice of Disciplinary Action (FNDA) (R-1) was issued notifying appellant of her suspension for fifteen working days beginning July 13, 2013. This matter was transmitted to and filed with the Office of Administrative Law on July 30, 2013, by the Civil Service Commission for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A hearing was held on May 1, and May 19, 2014. At that time, the parties requested time to submit written closing statements and legal memorandums. The record closed on July 22, 2014, upon the receipt of the post-hearing submissions. An extension of time within which to issue the Initial Decision was requested and granted for good cause.³

TESTIMONY

Sgt. Elliot Robinson (Robinson)

Robinson has been employed with the Correction Center for twenty-six years. He became a sergeant in June 2005. He presently serves on the B-tour, from 7 a.m. to 3 p.m. His assigned location is visiting area the C, and D pod D. His function is to keep the location safe and secure for officers and civilians. Robinson testified that officers

³ Counsel for appellant advised the undersigned, after informing appellant, that his firm had rejected the representation of a witness in this case on an unrelated matter because of the existing representation of appellant. The circumstances have been explained to the appellant. Appellant has agreed to voluntarily waive any conflict that arguably could have been created and seeks David Beckett, Esq., to continue his representation of her. The undersigned voir dired the appellant and accepted that her waiver of the potential conflict was voluntary.

frequently would be held over into the next shift due to personnel issues. The A-tour, 11 p.m. to 7 a.m., officers were regularly held over. He supervised Giddens at the time of the incident, and was the superior she would contact with a request to leave before the end of her shift.

On April 4, 2010, a directive advised all A-tour officers to remain after their shift into the next shift until approximately 11 a.m., and break themselves. There are usually five or six correction officers on that post; he did not recall whether there were five or six that day. Giddens expressed disappointment at the directive to stay; at about the same time, she requested and took a break. Sometime between 10 a.m. and 11 a.m., Giddens asked to leave for personal reasons. Robinson advised her that he had to address a problem at pod C, and when he got to the control room he would check with the shift commander. He spoke to the shift commander, Lt. David Santituro, sometime prior to 12:30 p.m. Robinson received authority to allow Giddens to leave her post; however, when Robinson went to contact Giddens, the shift commander and Robinson found out that Giddens had already turned in her radio and departed the premises. Robinson expressed surprise that Giddens had left, as she would have known that the shift commander might have to change numerous officers' post locations to cover her absence. Giddens did not inform Robinson or the shift commander of her departure. Robinson testified that this failure to communicate should not have happened. Giddens could not reasonably have assumed that she was authorized to leave.

Lt. David Santituro

Santituro has worked at the Correction Center for more than twenty-one years, and has been a lieutenant since 2007. He served on B-tour on April 4, 2010. At approximately 12:15 p.m., Robinson first informed Santituro of Giddens's request to leave; he anticipated granting the request, but Santituro discovered that Giddens had already departed. Santituro directed Robinson to complete an incident report. The following day, Santituro directed Giddens to complete an incident report. Santituro testified that Giddens's request to depart likely would have been approved; however, the departure without communication from Giddens is the concern. Santituro stated that if Robinson had authorized Giddens's departure, he would have backed his sergeant

and Robinson would not be disciplined for the action. If Robinson had authorized Giddens's departure, he would have to fill out an incident report, and Giddens should have filled out an overtime slip. Robinson never stated that he authorized Giddens's departure.

Santitoro stated that the amount of time it took to get a response to Giddens about her request to leave, one and one-half hours, could have been unreasonable based upon the facts. However, Santitoro stated that Giddens could have contacted the control room directly and made her request to him, which she did not do. He also testified that he would not wish to receive all such requests directly; such requests normally should be routed through the sergeant, in accordance with the chain of command. He did not know of any post order that would have allowed a direct request to him.

Santitoro stated that his priorities are the custody and security of the inmates, officers and the public. If Robinson had failed to relay Giddens's request to depart because of other issues in the facility related to the priorities of custody and security of the inmates, then Robinson's delay may not have been unreasonable. Giddens's request appeared to have been for personal reasons.

Capt. Richard Bearden (Bearden)

Bearden commenced employment with the Correction Center in 1990, and in November 2004 became captain. His duties include working with the warden and institution of disciplinary action. He identified R-5, R-6, R-7 and R-8, regarding rules and disciplinary actions. The disciplinary charge in this case is that appellant left her post without being relieved. Giddens has a previous incident of this type of behavior, for which she received discipline. As a Step 2 violation, the potential discipline for the current charge is a penalty ranging from five days' suspension to removal.

Bearden testified that a sergeant is authorized to allow an officer to leave a post, and it would be the sergeant's obligation to inform the shift commander. However, the officer would have to fill out a form before leaving. Bearden did not have any personal

factual knowledge of the current matter, only the procedures that would apply based upon the documentary evidence.

Dawn Giddens

Giddens testified that she has worked for the Correction Center for thirteen years. She is presently on leave as a result of a back surgery. Her recent duty prior to her leave was protective custody. On April 4, 2010, she was held over to the B-tour, 7 a.m. to 3 p.m., after having worked the A-tour. Holdovers happened a lot. It is mandatory overtime. She did not remember her duties on the A-tour in 2010. On the holdover that day, her duty included the visiting hall. She was one of four officers sitting at the table. The morning visiting shift was 8 a.m. to 11:30 a.m. A head count would then be done, followed by the afternoon visiting shift from noon to 2 p.m.

Giddens testified that on April 4 she spoke to Robinson at about 9:30 a.m. She advised him that she needed to leave for a personal issue. She testified that Robinson authorized her departure, and he said that he would let the shift commander know. She left at 9:45 a.m. Giddens testified that she turned in her radio to master control. She did not remember if she saw Santituro at master control. She did not fill out any overtime slips. Giddens testified that an officer never fills out the overtime slips, and she did not fill out any overtime slip when she previously or subsequently worked overtime.

Giddens testified that if Robinson had not authorized her to go, she would not have gone. She said that she spoke to Robinson in the residence hall, and her leaving was the only thing that they discussed. There was no discussion of an incident at pod C.

Giddens said that she did not look for an overtime slip when she left that day, and she slipped her radio through the window slot. She did not speak to anyone. She did not wait for anyone to relieve her position. Her personal problem led her to leave quickly. Her testimony implied that she had concern over staining her uniform if she did

not leave immediately. She did not remember whether she looked at her next pay check to see if she got paid for all her overtime.

FACTUAL DISCUSSION

This matter is only resolved by a determination of credibility. The following questions need consideration. Did Robinson authorize Giddens to leave on April 4, 2010, in the morning hours because she needed to leave for personal reasons? Did Robinson advise Giddens to await his discussion with the shift commander, Santituro, which did not occur for approximately two hours? On April 4, 2010, Robinson prepared an incident report at approximately 12:30 p.m. (R-3.) It reflected that Giddens had left her assigned post without authorization, in disregard of the chain of command and in direct disregard of her superior officer, Robinson. Did Robinson have any motivation in falsely reporting the incident of April 4? Giddens testified that at or about 9:45 a.m. she turned in her radio and did not wait to obtain an overtime slip. Did Giddens take it upon herself to abandon her post and leave the grounds without authorization from Robinson and without regard to her responsibilities? Giddens has thirteen years of employment with the Correction Center. Is it likely she would have abandoned her post and left the grounds without authorization from Robinson? On April 5, 2010, Giddens became aware that Robinson did not tell Santituro that she had been given permission to leave, and Santituro directed Giddens to complete an incident report (R-4). On that date, at approximately 1 p.m., Giddens completed her incident report. Her report stated that on April 4 she started to not feel well at about 9:30 a.m., and she advised Robinson that she was not feeling well, telling him, "I need to leave." The report reflected that Robinson gave her authorization to leave, and told her that he would inform the shift commander. She reported that the next day, Lt. Santituro told her that he had not been informed by Sgt. Robinson that Robinson had told Giddens that she could leave. Giddens wrote in her report, "from my understanding, I am being lied on at this time." In fact, she titled her incident report, "Officer being lied on." This is at best a reflection of Giddens's attitude on discovering that management believed that she did not have authorization to leave early the day before.

In regard to Robinson's testimony, appellant's counsel expressed two potential motivations for his testimony to be unreliable. The first is that Robinson would have been disciplined for allowing Giddens to depart without the shift commander's authorization; the second is that Robinson's attention to the incident at pod C diverted his attention from Giddens's request. That is, Robinson forgot that he had authorized Giddens to depart. Both these contentions are conjecture, but are not supported by any evidence adduced at the hearing. Reardon testified that Robinson had the authority to release Giddens. Santituro testified that Robinson first informed him of Giddens's request at 12:15 p.m., and that he would have approved Giddens's request, but then he discovered that Giddens had already departed. Robinson's report (R-3) did reflect that Giddens did not request to leave until the start of the afternoon visits. Robinson testified that he had an 8:00 a.m. conversation with the visiting area personnel and advised them to break themselves. Giddens expressed disappointment with this news, but asked to be able to break. Robinson's rendition of that morning is more credible. He knew staff to be short and would likely seek permission from someone up the chain of command rather than authorize someone to leave. Accordingly, it is more likely than not that Robinson did not authorize Giddens's early departure at 9:30 a.m. It is more likely the request came later in the day and he directed Giddens to await Robinson's communication with Santituro, and the latter's approval of the early departure.

Giddens's testimony that holdovers were a regular occurrence indicates that she could have anticipated a likelihood that she may be held over. She advised Robinson that she did not "feel well" and she "had to leave." This is not language of a request to a superior. Giddens sought and took a break, which is language inconsistent with her immediate departure after Robinson's alleged 9:30 a.m. approval to leave. She did not look for any overtime voucher and did not look at her pay check to see if she received payment for the additional work she performed or whether there may have been an overpayment. The inconsistencies are greater in her factual presentation, and for those reasons, I find her testimony less credible.

An unreasonable period of time passed before Robinson communicated with Santituro. Giddens could have renewed her request with Robinson if her condition were urgent, or otherwise gone up the chain of command.

FINDINGS OF FACT

As a result of the testimony and documentary evidence, I **FIND** the following **FACTS**:

1. Giddens has been employed with the County of Mercer since October 1, 2001, in the position of correction officer.
2. On April 4, 2010, Giddens was working her post at the gym A-tour (11 p.m. to 7 a.m.).
3. Robinson advised Giddens at approximately 7:00 a.m. that she would be held over to the next tour. At approximately 9:30 a.m., Giddens discussed her early departure with Robinson because she did not feel well.
4. Robinson advised Giddens that he would speak to the shift commander to seek approval for her early departure, but had to attend to a pressing matter at pod C.
5. Robinson advised Santitoro at approximately 12:15 p.m. of Giddens's request to leave. This extended delay until Robinson informed Santitoro of Giddens's request to leave is an unreasonable delay.
6. Giddens could have recontacted Robinson to ask about the status of her request, or otherwise gone up the chain of command to get an answer to her request to leave. She took neither course of action.
7. Giddens departed the Correction Center sometime during the morning hours of April 4, 2010, prior to receiving authorization to leave her post.

8. Giddens's departure from the Correction Center without authorization is a violation of SOP 238, specifically, Section 1, General Responsibilities, dealing with not leaving an assigned post without authorization. (R-5.)

9. Giddens's departure from the Correction Center without authorization is a violation of SOP 004, specifically, Rules of Conduct section 1.02.2, dealing with compliance with departmental rules, orders or other directives, in writing or verbal, and section 1.02.11, dealing with not leaving an assigned post without authorization. (R-6.)

LEGAL ANALYSIS AND CONCLUSIONS

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 11A:1-2(a). Such an employee may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a).

An appeal to the Civil Service Commission requires the OAL to conduct a de novo hearing to determine the employee's guilt or innocence, as well as the appropriate penalty if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987).

The burden of persuasion falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The appointing authority must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what

is needed to satisfy the standard must be decided on a case-by-case basis. 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 (1958). 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).

Giddens is charged with violations of N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, and N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee.

Based on the above finding that appellant violated administrative procedures and/or regulations involving safety and security (D-6), SOP 004 & SOP 238, specifically, leaving the grounds without authorization and without being properly relieved, I **CONCLUDE** that the charge of violation of N.J.A.C. 4A:2-2.3(a)(12) has been proven.

"Conduct unbecoming a public employee" is an elastic phrase, which 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 Atlantic 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)).

Giddens's counsel sought to support his client's version of the event by arguing that the approximate two-hour delay in Robinson speaking to Santitoro about Giddens's request to leave was unreasonable, and that Robinson's attention to other more pressing matters might have caused him to forget that he had directly authorized

Giddens's departure. However, counsel did not pursue Robinson with this alleged possibility, and there is no evidentiary basis to consider this argument.

Based on the above finding that appellant violated administrative procedures and/or regulations involving safety and security (D-6), SOP 004 & SOP 238, specifically, leaving the grounds without authorization and without being properly relieved, I **CONCLUDE** that the charge of violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, has been proven. A correction officer leaving her post without authorization constitutes violation of particular rules and regulations of the department, as well as violation of the standard of good behavior expected of correction officers.

PENALTY

When dealing with the question of penalty in a de novo review of a disciplinary action against a civil service employee, the proofs and penalty on appeal based on the charges presented must be evaluated. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962). Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. West New York v. Bock, supra, 38 N.J. at 522-24. Major discipline may include removal, disciplinary demotion, and suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions evaluated by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

Turning to Giddens's prior disciplinary record R-8 reflects a settlement of three prior disciplinary matters in 2007, 2008, and 2009, for a total penalty of six days. R-8 does not reflect the nature of the offenses that were settled. Petitioner's prior

disciplinary history with Mercer County is not part of the record as petitioner objected to same. From the settlement agreement, it is difficult to ascertain whether a Step 2 violation of D-6 of the Mercer County Table of Offenses has occurred. A Step 1 violation of D-6 of the Mercer County Table of Offenses provides for a range of official written reprimand to removal, a Step two provides a range of five days to removal.

Giddens's proposed suspension in this matter is fifteen days from the FNDA. The respondent initially sought in the PNDA a fifteen-day suspension. A violation of Standard Operating Procedure (SOP) 004 and 238, (D-6) on the Mercer County Table of Offenses provides for a range of discipline from OWR to removal. No discipline guideline is provided for the violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming.

While the respondent's disciplinary action appears based on a Step 2 violation of D-6, I see no reason to disturb the discipline respondent determined appropriate in the FNDA. A reasonable calculation of progressive discipline in the presence of the prior disciplinary actions, the conduct of the appellant, and the current violations is a fifteen-day suspension.

Accordingly, I **CONCLUDE** that the respondent's imposition of a fifteen-day suspension is appropriate.

ORDER

I **ORDER** that Giddens's appeal is **DENIED** in all respects.

I further **ORDER** that the fifteen-day suspension against Giddens is **AFFIRMED**.

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 20, 2014
DATE

Joseph A. Ascione
JOSEPH A. ASCIONE, ALJ

Date Received at Agency:

10/20/14

Date Mailed to Parties:

10/20/14

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APPENDIX

LIST OF WITNESSES

For Appellant:

Dawn Giddens

For Respondent:

Sergeant Elliot Robinson
Lieutenant David Santitoro
Captain Richard Bearden

LIST OF EXHIBITS

For Appellant:

P-1 Agreement between County of Mercer and PBA Local 167 Mercer County
Correctional Officers 1/1/2009 to 12/31/2014 dated January 18, 2013

For Respondent:

R-1 June 28, 2013, FNDA
R-2 April 15, 2010, PNDA
R-3 Robinson Incident Report dated April 4, 2010
R-4 Giddens Incident Report dated April 5, 2010
R-5 SOP 238 Post Orders—Correction Officer (General)
R-6 SOP 004 Employee Handbook
R-7 Mercer County Table of Offenses and Penalties
R-8 Final Notice of *Major* Disciplinary Action, multiple dates