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STATE OF NEW JERSEY

In the Matter of Omar Ortiz, Hudson
County

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket No. 2012-2997
OAL Docket No. CSV 05727-12

ISSUED: AUG 06 2014 (CSM)

The appeal of Omar Ortiz, a Correction Lieutenant, with Hudson County, of his 30 working day suspension, on charges, was heard by Administrative Law Judge Imre Karaszegi, Jr., (ALJ), who rendered his initial decision on May 7, 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, as well as the exceptions and cross exceptions filed by the parties, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on July 16, 2014, accepted and adopted the Findings of Fact as contained in the attached initial decision but did not adopt the ALJ's recommendation to modify the 30 working day suspension to a five working day suspension. Rather, the Commission modified the 30 working day suspension to a 20 working day suspension.

DISCUSSION

The appellant was suspended on charges of conduct unbecoming a public employee, incompetency, inefficiency or failure to perform duties, insubordination, neglect of duty, and other sufficient cause. Specifically, it was asserted that the appellant failed to follow instructions not to alter the line-up schedule unless it was necessary due to sick calls and that he failed to send a report regarding his decision to re-assign staff after he was instructed to do so. Upon the 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 indicated that County Correction Captain Tish Nalls served as the Unit Manager for Unit 2 of the correctional facility and one of her responsibilities included setting staff "line-up" assignments. Nalls designated County Correction Sergeant Michael Conrad to make line-up assignments in her absence. The appellant, who is his union's president, served as the Officer-in-Charge (OIC) of the 10:00 p.m. to 6:00 a.m. shift whose responsibilities included ensuring that vacancies in all the units are filled and that there is supervision for each unit. When a vacancy occurs in a unit, the appellant moved the least senior sergeant in a different unit to fill the vacancy. Alternatively, the most senior sergeant in a different unit could volunteer to fill the vacancy in another unit. Deputy Director Kirk Eady previously ordered the appellant not to reassign Conrad to Unit 2 because Conrad had filed a complaint against the appellant and they needed to be kept separated. Thus, when making reassignments, the appellant only spoke with Eady and Director Aviles, not Nalls. Conrad was the least senior sergeant in Unit 2 and Nalls was never informed that the appellant could not move Conrad.

On November 15, 2011 the appellant altered the line-up by moving County Correction Sergeant Williams from Intake OIC to a vacant Service and Security post in Unit 1 based on her earlier request to move to Unit 1 whenever possible, which resulted in his changing County Correction Sergeant Donald Mitchell from being unassigned to Intake OIC. The ALJ determined that these reassignments were consistent with Nalls' previous instruction that the appellant could make necessary operational reassignments and were consistent with Eady's confirmation that a supervisor could volunteer out of their unit if there was a shortage of supervisors in another unit. Nalls ordered the appellant to submit a report documenting the reasons for this change, but his e-mail response did not explain the reason for the change. On November 16, 2011, the appellant moved Williams from Intake OIC in Unit 2 to Service and Security OIC, Mitchell from being unassigned to Intake OIC, and County Correction Sergeant Turner from Service and Security OIC to OIC of Unit 4. There was no evidence that Turner's move was improper and the appellant moved Williams based on her earlier request, which resulted in Mitchell, who was unassigned, being moved to fill that vacancy. As such, the ALJ determined that these reassignments were consistent with Nalls' previous order.

With respect to the report, the ALJ found that instead of explaining the reassignments to Nalls, he responded only to Eady, and copied Avila. Although Nalls accepted the explanations for the reassignments in December 2011, the ALJ noted that the appellant's explanation that he could not disclose the reason for the reassignment because he did not believe he could disclose Eady's prohibition on him reassigning Conrad to Nalls was misguided because Conrad's assignment played no

role in the November 15, 2011 reassignments. There was also no evidence to support the appellant's assertion that he was disciplined as a result of his union activity or speech. As such, the ALJ determined that the charges of conduct unbecoming a public employee, incompetency, inefficiency, or failure to perform duties, neglect of duty, providing false statements, and other sufficient cause could not be sustained relevant to the appellant's altering of the line-ups. However, the ALJ upheld the charges of conduct unbecoming a public employee, failure to perform duties, insubordination, neglect of duty, and other sufficient cause for failing to provide Nalls with a report justifying the November 15, 2011 reassignments and recommended modifying the 30 working day suspension to a five working day suspension.

In its exceptions to the ALJ's decision, the appointing authority presents that the ALJ erred in finding that Williams previously told the appellant that she would volunteer to move anytime she could based on a report she submitted indicating that she was not asked if she wanted to opt-out of intake or volunteer on November 15, 2011 and November 16, 2011. The appointing authority contends that the ALJ's interpretation of Williams' report must be rejected. Therefore, the appointing authority argues that based on the appellant's disciplinary history, which includes a 15 day suspension, the 30 working day suspension should be upheld.

In response, the appellant states that he was in fact retaliated against based on his role as union president. As evidence of this claim, he alleges that certain employees involved in this matter engaged in unrelated illegal activity, and the appellant was one of the victims of this illegal activity. Thus, in accordance with *Winters v. North Hudson Regional Fire and Rescue*, 212 N.J. 67 (2012), the appellant argues that a full record should have been created and the ALJ should have addressed all of his retaliation claims since he did not commit any actions for which he should have been disciplined. As such, the appellant maintains that even if any of the charges are sustained, he should receive nothing more than a reprimand for seeking clarification on a staffing issue.

Upon an independent review of the record, the Commission agrees with all of the ALJ's Findings of Fact and concludes that the appointing authority has not met its burden of proof regarding the alleged conduct pertaining to the appellant's altering of the line-ups. However, the appointing authority has met its burden of proof regarding the charges of conduct unbecoming a public employee, failure to perform duties, insubordination, neglect of duty, and other sufficient cause for failing to provide Nalls with a report justifying the November 15, 2011 line-up changes. However, for the reasons set forth below, the Commission finds the appointing authority's exceptions persuasive in that the appellant's misconduct warrants a higher penalty.

Although the appellant argues that he was disciplined in retaliation for his union activities, there is no evidence in the record to support this claim. The Commission agrees that Conrad's assignment played no role in the appellant's November 15, 2011 reassignments because Mitchell was already unassigned and Williams had volunteered to move to fill the vacancy in Unit 1. In this regard, Williams' brief written report indicating she was not "asked" if she wanted to opt-out of intake or volunteer on November 15, 2011 or November 16, 2011 does not contradict the fact that she previously advised the appellant that she would like to come out of her unit anytime that she could. Regardless, the appellant was required to comply with Nalls' order to provide her a report justifying the November 15, 2011 reassignments. The appellant's failure to follow the command structure and provide Nalls with the required report does not evidence that he was disciplined in retaliation for his union activities. As such, *Winters, supra*, would not apply to this situation. The Commission further notes that it did not consider the allegations of appointing authority misconduct made by the appellant in his cross exceptions, which were not part of the underlying record.

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 also 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 appellant's 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. However, 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).

In this case, as a second level supervisory law enforcement officer, the appellant is in a position that requires him to ensure proper utilization of the command structure and to comply with valid orders from superior officers. Therefore, his failure to comply with a direct order from a superior officer to provide a report justifying the November 15, 2011 reassignments cannot be tolerated. The fact that a supervisory law enforcement officer is guilty of such conduct compounds the seriousness of the offense. In this regard, the Commission notes that a law enforcement officer is held to a higher standard than a civilian public employee. *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). The Commission is particularly mindful of this standard when disciplinary action is taken against a

high ranking law enforcement officer. The appellant's disciplinary history includes one three day suspension in 2008, two five day suspensions in 2008 and a 15 day suspension in 2011. Given the facts of this case and the appellant's prior disciplinary history, the Commission finds that a 20 working day suspension is appropriate for the appellant's actions.

Since the penalty has been reduced, the appellant is entitled to back pay, benefits and seniority pursuant to *N.J.A.C. 4A:2-2.10*. However, the appellant is not entitled to counsel fees. *N.J.A.C. 4A:2-2.12(a)* provides for the award of reasonable counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. See *Johnny Walcott v. City of Plainfield*, 282 N.J. Super. 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div., March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, the appellant has not prevailed on all or substantially all of the primary issues in the appeal since some of the charges was sustained. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C. 4A:2-2.12(a)*, counsel fees must be denied. See *Bazyt Bergus v. City of Newark*, Docket No. A-3382-00T5 (App. Div. June 3, 2002); *In the Matter of Mario Simmons* (MSB, decided October 26, 1999). See also, *In the Matter of Kathleen Rhoads* (MSB, decided September 10, 2002) (Counsel fees denied where removal on charges of insubordination, inability to perform duties, conduct unbecoming a public employee and neglect of duty was modified to a 15-day suspension on the charge of neglect of duty).

ORDER

The Civil Service Commission finds that the action of the appointing authority in imposing discipline was justified, but modifies the 30 working day suspension to a 20 working day suspension. The Commission further orders that the appellant be granted 10 days of back pay, benefits and seniority.

Counsel fees are denied pursuant to *N.J.A.C. 4A:2-2.12*.

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 16TH DAY OF JULY, 2014



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Chairperson
Civil Service Commission

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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 05727-12

AGENCY DKT. NO. 2012-2997

**IN THE MATTER OF OMAR ORTIZ,
HUDSON COUNTY DEPARTMENT
OF CORRECTIONS.**

Charles J. Sciarra, Esq., for appellant Omar Ortiz (Sciarra & Catrambone,
attorneys)

Daniel W. Sexton, Assistant County Counsel, for respondent (Donato J. Battista,
County Counsel)

Record closed: September 24, 2013

Decided: May 7, 2014

BEFORE **IMRE KARASZEGI, JR.**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Omar Ortiz, appeals a thirty-day suspension imposed by respondent, the Hudson County Department of Corrections (HCDOC). The HCDOC served a Preliminary Notice of Disciplinary Action (PNDA) against appellant on December 28, 2011, charging Ortiz with conduct unbecoming a public employee, incompetency, inefficiency, or failure to perform duties, insubordination, neglect of duty, and other sufficient cause based on the following attached specifications.

On 9/23/11 you were instructed via e-mail correspondence, to ensure that the Unit 2 line-up is not altered after I approve the assignments. You were further instructed that the only authorized changes were those necessitated by sick call. You responded acknowledging receipt and understanding of my directive. On 11/15/11 and 11/16/11, I assigned Sergeant Senora Williams to Intake as the Intake [Officer-in-Charge]. On both dates you took it upon yourself to alter the line-up and re-assign Sergeant Williams to Security. You were ordered to submit a report to my attention explaining your reason for making the changes. You failed to submit a report as ordered. However, you responded by email stating that you consulted Director Aviles and Deputy Director Eady on your decision. You copied the Director and the Deputy Director on your correspondence. Upon receiving your message, Deputy Director Eady stated you provided false information and directed you to justify, to my attention, your decision to re-assign Sergeant Williams. Again you failed to submit a report as directed. Therefore, you are in violation of the Rules and Regulations.

After departmental hearings, the HCDOC sustained the charges and imposed a thirty-day suspension via a Final Notice of Disciplinary Action (FNDA) dated March 29, 2012. On April 11, 2012, Ortiz requested a hearing before the Civil Service Commission. The matter was transmitted to the Office of Administrative Law (OAL), for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was heard on January 9, 2013, January 10, 2013, and May 21, 2013. The parties submitted written summations, and following their receipt, the record closed. Orders were entered extending the time for filing this decision.

FACTUAL DISCUSSION

After carefully considering the testimonial and documentary evidence presented, and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I **FIND** the following **FACTS**:

Captain Tish Nalls served as a Unit Manager for the HCDOC's Unit 2 during the fall of 2011. The HCDOC maintains five separate units that operate in tandem during shifts at its corrections facility. Unit managers are responsible for the operations and

total functioning of their unit. This includes setting staff line-up assignments in advance for their particular unit over the HCDOC's various shifts. Line-ups consist of individuals being assigned to particular posts within the unit. Unit managers assign their unit's staff to make sure there is a full complement during each shift. Nalls's responsibility included staff assignments to Unit 2's 10 p.m. to 6 a.m. shift. She designated Sergeant Conrad to make line-up assignments in her absence.

Ortiz is a twenty-three-year veteran of the HCDOC and also served in the military. He served as a lieutenant and was the officer-in-charge (OIC) of the 10 p.m. to 6 a.m. shift during the fall of 2011. The OIC is responsible for the daily operations of a particular shift and anything that should arise at the jail during that tour of duty. This responsibility included ensuring that vacancies in all the units are filled and that there is also supervision for each unit. OICs must also make sure the subsequent shift was properly staffed. The HCDOC post order stated that OICs "shall be responsible for the assignments of supervising officers under his command to properly staff the Hudson County Correctional Center to ensure the safety and security of the staff and inmates, and ensure that the security of the facility is not compromised."

Ortiz also served as union president and maintained a dual role of fulfilling his functions as a lieutenant within the HCDOC's command structure and also representing union members regarding collective bargaining issues. Through his union role he was involved in contract negotiations in 2011 and also had conversations with Deputy Director Eady and Director Aviles about the HCDOC's desire to promote union members without providing a pay increase around the fall of 2011. Ortiz described his dealing with the HCDOC's administration contentious.

When there was a vacancy in a unit, Ortiz usually moved the least senior sergeant in a different unit to fill the vacancy. Alternatively, the most senior sergeant in a different unit could volunteer to fill the vacancy in another unit. Deputy Director Eady previously ordered Ortiz could not reassign Sergeant Conrad in Unit 2 because Conrad had filed a complaint against Ortiz. Eady wanted to keep them separated and issued orders to do so. Conrad was the least senior sergeant in Unit 2 and Ortiz's understanding was that he could not move Conrad to another unit. As a result, Ortiz

began contacting Eady when reassigning individuals in Unit 2. Eady never expressly prohibited Ortiz from speaking with Nalls about his situation with Conrad. However, pending investigations are supposed to be confidential, and the investigation into Conrad's complaint against Ortiz was ongoing at the time. Nalls never received any instruction that Ortiz could not move Conrad. She did not learn about such a prohibition until the departmental hearing in this matter.

In September 2011, Nalls sent Ortiz an email asking why Unit 2's lineup was changed from the assignments she made. She instructed Ortiz that "[t]he only changes I authorize are those necessary, for operations, to fill in vacancies due to absences. Outside of operations assigning staff to fill vacancies caused by sick call, Sgt. Conrad is the only individual empowered to make assignments in my absence." Ortiz believed this directive undermined his authority as OIC. Ortiz responded to Nalls the next morning via email as follows:

Thank you as its been [sic] a long term since I heard from you Congratulations on your promotion. [sic] If there was an issue with the line ups [sic] I wish it was brought to my attention and it would have been addressed at that time. I hope that it is not a case of jumping the chain of command in order to create a negative environment. I look forward to working with you in any capacity as I am committed in keeping and opening lines of communications [sic] in order to establish a better work environment.

Nalls immediately responded the following:

[t]his communication is bringing the issue to your attention. When I discovered the changes this morning. [sic] I addressed the officer under whose name the changes were made. I consider the situation handled and wish to take it no further and informing you that it took place. [sic] Thanks for your sentiments. I really appreciate your thoughtfulness. Have an uneventful night at work.

Nalls made no further inquiry regarding the assignment and did not consider any discipline against Ortiz at the time.

In November 2011, Nalls remained Unit Manager for Unit 2 and Ortiz remained

OIC on the overnight shift. Ortiz continued to communicate with the Eady and Aviles regarding his reassignments of individuals in Unit 2. Ortiz emailed Aviles on November 8, 2011, that "[a]s per my conversation with Deputy Director Eady I could not move Sgt Conrad as per him (DEPUTY DIRECTOR EADY). We still await an official memo in the event the IOC can no [sic] reach Deputy Director Eady your help in this matter will be greatly appreciated." He signed that email on behalf the union. On November 12, 2011, Ortiz sent an email to Deputy Director Eady and copied Director Aviles stating the following:

As per our conversation and your authorization on 12 November 2011 Sgt. Williams was assigned to the record room and Sgt. Conrad was assigned to receiving. If in the future this practice is to stop please advise. At no time was this an act of disrespect to Captain Nalls as I have not received any memos or am not aware [sic] of any pending investigation or who has been briefed. So in order to keep the integrity of your administrative decision I only directed the assignment question to you. Thank you for your assistance in this matter.

Nalls subsequently set a lineup for Unit 2's overnight shift for November 15, 2011, with Sergeant Williams assigned as Intake OIC and Sergeant Donald Mitchell unassigned. Ortiz changed that lineup with Mitchell assigned as Intake OIC and Williams reassigned to Unit 1 to fill the vacant Service and Security OIC post in that unit. Prior to making the changes, Ortiz had called Deputy Director Eady at home regarding reassigning Williams from Unit 2 to Unit 1 on November 14, 2011.

Nalls learned about these changes to her lineup assignment later on November 15, 2011, and emailed Ortiz the following:

Last night, 11/15/11, I assigned Sgt. Williams to Intake as the IOC. After reviewing the line-up today I discovered she was re-assigned to Security. You are ordered to submit a report documenting the reason for the change and with whose authorization. [sic] Your report should be submitted no later than the end of your next tour of duty.

Ortiz replied later that same day and copied the Deputy Director Eady and Director Aviles on his email the following:

With all do [sic] respect I have been going thru Deputy Director Eady via phone followed by a e-mail [sic] to Director Aviles and Deputy Director Eady. I was not informed why the director wants this done this way but with his permission I will forward the e-mails to you. Please advise ??? As per my conversation 11/15/2011 with Deputy Director Eady Sgt. Williams is assigned to security for 11/16/2011. He advised me that he will discuss the matter with you I will follow the outcome of said meeting as per your orders. If there is any misunderstanding I apologize.

Nalls also set a lineup for Unit 2's overnight shift for November 16, 2011, which had Sergeant Williams assigned as Intake OIC and Sergeant Mitchell unassigned. Separately, Sergeant Turner was assigned as the Service and Security OIC in Unit 1. However, changes were made to Nalls's lineup for Unit 2 with Sergeant Mitchell as Intake OIC and Sergeant Williams, who Nalls had assigned as the Intake OIC, reassigned to Unit 1 as the Service and Security OIC. Unit 4 Sergeant Turner was reassigned as the OIC of Unit 4, which previously had no OIC.

Following Ortiz's email response, Nalls contacted Eady and Aviles to determine whether Ortiz's explanation that they authorized him to make the reassignment was accurate. However, Eady told Nalls that Ortiz had given him misleading information regarding the reassignment. Eady testified that he believed Williams was unassigned based upon telephone conversation with Ortiz on November 14, 2011, but provided no specific explanation regarding the basis for that belief. Ortiz denied giving Eady the impression that Williams was unassigned. He explained that he would not have called Eady for guidance if Williams was unassigned.

After his conversation with Nalls, Deputy Director Eady emailed Ortiz, Nalls, and Aviles on November 16, 2011, the following:

Lt. Ortiz,

I spoke with Capt. Nalls this evening. If she already assigned Sgt. Williams to Intake, why would you call me to change her assignment? You made it seem she was unassigned in Unit 2. You need to justify your re-assignment to Capt. Nalls.

Kirk Eady
Deputy Director

Ortiz then responded to Eady and copied Aviles, but not Nalls, during the early hours of November 16, 2011. In that response, Ortiz wrote the following:

As the senior supervisor Sgt. Williams can op [sic] out as she advised me last week that she would like to come out of her unit anytime she can. As per your decision I am not to move junior supervisor Conrad my hands are tide [sic] please advise me on what it is you would like me to do here on out.

On November 17, 2011, when Ortiz failed to provide Nalls with a report justifying the November 15 reassignment after her directive to submit a report and Eady's second directive to justify the re-assignment, Nalls recommended the underlying charges be brought against Ortiz.

Nalls requested and received reports from Williams and another officer regarding Ortiz's November 15 reassignments. She asked Williams to draft a report because Williams was the senior sergeant in the unit and unless she volunteered to be reassigned to another unit, there was no reason for Ortiz to move her. Nalls had no information or knowledge that Williams had indicated she wanted to opt out of Unit 2 at the time. However, Williams previously told Ortiz that she would volunteer to move to Unit 1 anytime the situation would arise as the senior sergeant in Unit 2. Williams's report to Nalls stated only that on November 15 and 16 she "was not asked if [she] wanted to opt out of intake or volunteer" and did not address whether she had previously indicated a desire to volunteer in the future. Williams's desire to move to Unit 1 is corroborated by her subsequently volunteering to move to Unit 1 on at least two occasions in December 2011.

Eady subsequently sent Ortiz an email in early December 2011 clarifying the process for reassignments in the lineup and the interplay between unit manager assignments and OIC reassignments. That email provided the following:

All post assignments within a unit are completed by the unit manager or their designee and placed on the line up [sic]. The Line up [sic] should be considered a written order. If circumstances arise to where an employee cannot fulfill their duties, then a reassignment can be made by the O.I.C. The O.I.C. will generate a report to the effected unit manager as to why the reassignment was needed.

A supervisor may elect to volunteer out of their unit for reassignment only if there is a shortage of a supervisor in a different Unit. If no supervisor volunteers, the OIC will determine what supervisor is reassigned.

After Eady's clarification regarding reassignments, Ortiz reported the reassignments he made in Unit 2 by emailing Nalls. For example, Ortiz emailed Nalls about why he reassigned Williams on December 9, 2011, by explaining that Williams "volunteered to come out of her unit [and] there was a need in unit one security." Ortiz also emailed Nalls about why he reassigned Williams on December 13, 2011, by explaining that Williams "volunteered to come out of her unit [when] there was a need in unit one security." Nalls did not require that Ortiz complete an incident report form for those reassignments.

ANALYSIS AND CONCLUSIONS OF LAW

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. See N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); In re Polk, 90 N.J. 550, 560 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263, 274-75 (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, 49 (1975). Both guilt and penalty are re-determined on appeal from a determination by an appointing authority. Henry v. Rahway State Prison, 81 N.J. 571, 575-76 (1980); W. New York v. Bock, 38 N.J. 500, 519 (1962).

The HCDOC has charged Ortiz with violating N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency, or failure to perform duties, N.J.A.C. 4A:2-2.3(a)(2), insubordination, N.J.A.C. 4A:2-2.3(a)(7), neglect of duty, and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause for allegedly altering two lineups despite prior instruction not to do so, failing to submit a report regarding the November 15 reassignments as ordered, and providing false information to Eady during the telephone conversation regarding reassigning Williams.

Conduct unbecoming a public employee under N.J.A.C. 4A:2-2.3(a)(6) is an elastic concept, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or has a tendency to destroy public respect in the delivery of governmental service. 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 (Pa. 1959)). Such misconduct need not “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)).

Generally, incompetency, inefficiency, or failure to perform duties consists of the failure of an employee to adhere to proper procedures. See Okosa v. Union County Human Serv., CSV 5279-99, Initial Decision (July 20, 2000), modified, Merit Sys. Bd. (September 15, 2000), <<http://njlaw.rutgers.edu/collections/oal/>>. Insubordination has been defined as “not submissive to authority; disobedient[;]” it includes both “acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience.” Stanziale v. Cty. of Monmouth Bd. of Health, A-3492-00 (App. Div. April 11, 2002) (slip op. at 6-7), <http://njlaw.rutgers.edu/collections/courts/>. Insubordination is always a serious matter, especially in a paramilitary context. “Refusal to obey orders and disrespect cannot be tolerated” as “[s]uch conduct adversely affects the morale and

efficiency of the department.” Rivell v. Civil Serv. Comm’n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

Neglect of duty is predicated on an employee's omission to perform, or failure to perform or discharge, a duty required by the employee's position and includes both official misconduct and negligence. Clyburn v. Twp. of Irvington, CSV 7597-97, Initial Decision (September 10, 2001), adopted, Merit Sys. Bd. (December 27, 2001), <<http://njlaw.rutgers.edu/collections/oal/>>.

The standard of behavior for correction officers is set higher than other civil service employees; infractions may lead to major discipline for officers that otherwise would not warrant severe discipline for other positions. See Chopek v. Bayside State Prison, CSV 00658-01, Initial Decision (May 10, 2002), adopted, Merit Sys. Bd. (June 26, 2002), <<http://njlaw.rutgers.edu/collections/oal/>> (citing Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965)).

In this case, Ortiz altered Unit 2's lineup on November 15 and 16, 2011. On the November 15, Ortiz moved (1) Williams from Intake OIC in Unit 2 to the vacant Service and Security OIC in Unit 1 and (2) Mitchell from being unassigned in Unit 2 to Intake OIC in Unit 2. The Unit 1 Service and Security OIC post was vacant and Ortiz moved Williams to fill that vacancy based upon her earlier request to move to Unit 1 whenever possible. He then filled the vacancy created by Williams's move from Unit 2 Intake OIC by assigning Mitchell, who was unassigned, to that post. These reassignments were consistent with Nalls's previous instruction that Ortiz could make necessary operational reassignments to fill vacancies. These reassignments were also consistent with Eady's subsequent confirmation that a supervisor could volunteer out of their unit if there was a shortage of a supervisor in another unit.

On the November 16, Ortiz moved (1) Williams from Intake OIC in Unit 2 to Service and Security OIC in Unit 1, (2) Mitchell from being unassigned in Unit 2 to Intake OIC in Unit 2, and (3) Turner assigned from Service and Security OIC in Unit 1 to OIC of Unit 4, which was previously vacant. The Unit 4 OIC post was vacant and Ortiz moved Turner from Service and Security OIC in Unit 1 to fill that vacancy. The record is

devoid of any evidence regarding whether Turner volunteered to make that move. The focus during the hearing was on the members of Unit 2, and there is no evidence that Ortiz's reassignment of Turner to Unit 4 was improper. After Turner moved to Unit 4, the Unit 1 Service and Security OIC post became vacant. Again, Ortiz moved Williams to Unit 1 to fill that vacancy based upon her earlier request and Mitchell, who was unassigned, to fill the vacancy created by Williams's move. Again, these reassignments were consistent with Nalls's previous instruction that Ortiz could make necessary operational reassignments to fill vacancies and Eady's subsequent clarification that supervisors could volunteer out of their unit to fill a vacancy in another unit.

Therefore, I **CONCLUDE** that the HCDOC failed to prove by a preponderance of the competent, credible evidence that Ortiz's alteration of the Unit 2 lineups on November 15 or 16 constituted conduct unbecoming a public employee, incompetency, inefficiency, or failure to perform duties, insubordination, neglect of duty, or other sufficient cause for the discipline.

Ortiz was also "ordered to submit a report documenting the reason for the [November 15] change and with whose authorization" the reassignment was made by Nalls. His email reply to her did not explain the reason for the change, but reflected that it was done with Eady's permission. In a follow-up email, Eady indicated some confusion about his understanding of the circumstances during their conversation and told Ortiz that "[y]ou need to justify your re-assignment to Capt. Nalls."

Rather than explain the reassignment to Nalls, Ortiz responded only to Eady and copied Aviles, stating that "[a]s the senior supervisor Sgt. Williams can op [sic] out as she advised me last week that she would like to come out of her unit anytime she can." If Ortiz had emailed such an explanation to Nalls and noted that there was a vacancy in Unit 1 on November 15, he would have complied with Nalls's order that he submit a report documenting the reason for the change. Significantly, Nalls accepted such an explanation during subsequent reassignments of Williams by Ortiz in December 2011.

Any suggestion that Ortiz could not disclose the reason for the reassignment because he did not believe he could disclose Eady's prohibition on him reassigning

Conrad to Nalls is misguided. Conrad's assignment played no role in Ortiz's November 15 reassignment, because Mitchell was already unassigned in Unit 2 and Williams had volunteered to move to fill the vacancy in Unit 1. At the same time, the claim that Nalls's email order should be read to mean that Ortiz needed to submit an incident report form rather than provide an email explanation is incredulous. Significantly, Eady's subsequent explanation regarding OIC reassignments on December 2, 2011, specified that "[t]he O.I.C. will generate a report to the effected unit manager as to why the reassignment was needed." Following that instruction, Nalls repeatedly accepted email explanations as the method for generating such a "report" without incident.

Regardless, the acceptable form of the report is irrelevant because Ortiz never submitted an email or any other justification for the November 15 reassignments to Nalls. Ortiz's failure to comply with a direct order from two superior officers to justify the reassignment to Nalls adversely affected the efficiency of the HCDOC because proper command structure is vital and valid orders from superior officers must be complied with as part of the implicit standard of good behavior governing correction officers. Ortiz's failure to comply with those orders and explain the November 15 reassignments to Nalls represents an act of disobedience, a failure to submit to authority, and a failure to perform a required duty.

Therefore, I **CONCLUDE** that the HCDOC proved by a preponderance of the competent, credible evidence that Ortiz's failure to provide Nalls with a report justifying the November 15 reassignments constituted conduct unbecoming a public employee, failure to perform duties, insubordination, neglect of duty, and other sufficient cause for discipline.

The record does not support a finding that Ortiz provided any false information to Eady when he telephoned Eady about reassigning Williams. Eady claimed that Ortiz provided false information leading him to believe that Williams was unassigned during their conversation, but provided no specific explanation as to what occurred during that conversation or what lead to his belief that Williams was unassigned. Ortiz denied giving Eady any impression that Williams was unassigned and credibly testified that he

would not have called Eady if Williams was unassigned. If Williams was unassigned, Ortiz's authority to assign her to Unit 2 would have been beyond dispute.

Therefore, I **CONCLUDE** that the HCDOC has failed to prove by a preponderance of the competent, credible evidence that Ortiz provided any false information to Eady.

Finally, Ortiz asserts that the present disciplinary action was brought against him in retaliation for protected union activities and speech. However, there is no credible evidence that his role in the union, union activity, or speech played any role in the present disciplinary charges initiated by Nalls. Therefore, I **CONCLUDE** that Ortiz's assertion that the present discipline was retaliatory is meritless.

Progressive discipline is an indelible part of the disciplinary process. It is well-settled that an employee's past disciplinary record may be used as guidance in determining what the appropriate penalty should be. See Bock, supra, 38 N.J. at 523. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, a suspension or fine no greater than six months. See N.J.S.A. 11A:2-6(a), N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A: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.

Ortiz was suspended by the HCDOC on four occasions prior to the present charges. He was suspended for three days in January 2008, five days in April 2008, five days in June 2008, and fifteen days in April 2011. Despite Ortiz's prior disciplinary history, the thirty-day suspension levied upon him by the HCDOC is too severe. The

only violation proven by the HCDOC consisted of Ortiz's failure to provide Nalls with a report justifying the November 15 reassignments, while the HCDOC failed to prove that the underlying reassignments warranted discipline or that Ortiz provided false information to Eady. Ortiz's failure to provide such a report to Nalls warrants that he be suspended for five days.

ORDER

It is **ORDERED** that the charges of conduct unbecoming a public employee, failure to perform duties, insubordination, neglect of duty, and other sufficient cause related only to Ortiz's failure to submit a report regarding the November 15 reassignments be **SUSTAINED**.

Accordingly, it is **ORDERED** that the charges related to Ortiz's November 15 and 16 reassignments and allegedly providing false information to Eady be **DISMISSED**.


It is further **ORDERED** that the thirty-day suspension of Omar Ortiz be **MODIFIED** to a **SUSPENSION** for a period of five days.

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, 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.

May 7, 2014
DATE


IMRE KARASZEGI, JR., ALJ

Date Received at Agency:

5/7/14


Date Mailed to Parties: **MAY -8 2014**

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

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APPENDIX

LIST OF WITNESSES

For Appellant:

Omar Ortiz

For Respondent:

Tish Nalls

Kirk Eady

LIST OF EXHIBITS IN EVIDENCE

Joint:

J-1 Final Notice of Disciplinary Action (FNDA), March 29, 2012

For Appellant:

P-1 Caraccio decision, dated January 19, 2012

P-2 Series of e-mails

P-3 Incident report by Garibaldi, November 16, 2011

P-4 Employee discipline procedures (March 22, 2010)

P-5 E-mails from November 16, 2011

P-6 Lieutenant (duties and responsibilities) – post orders

P-7 Ortiz e-mails to Aviles (November 8, 2011)

For Respondent:

R-1 Ortiz to Nalls e-mails regarding lineup (November 15, 2011)

R-2 November 15, 2011, lineup (HCDOC)

R-3 Correction Officer Scheduling System (COSS) activity log (HCDOC)

R-4A November 16, 2011, lineup (original)

R-4B November 16, 2011, lineup (with changes)

R-5 Request for discipline (November 17, 2011) and PNDA (12-21-11)

- R-6 Conflicting orders Regulation 3.18
 - R-7 Notice from Ortiz naming designee (August 19, 2010)
 - R-8 Incident report from Williams, November 16, 2011
 - R-9 Ortiz employee profile (days of suspension only)
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