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STATE OF NEW JERSEY

In the Matter of Ruby Saunders
New Jersey State Prison
Department of Corrections

CSC DKT. NO. 2014-1004
OAL DKT. NO. CSR 15250-13

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: July 16, 2014 PM

The appeal of Ruby Saunders, a Correction Officer Recruit with the New Jersey State Prison, Department of Corrections, removal effective October 2, 2013, on charges, was heard by Administrative Law Judge Joseph Lavery, who rendered his initial decision on April 14, 2014. Exceptions and cross exceptions were filed on behalf of the parties.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on July 16, 2014, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Ruby Saunders.

Re: Ruby Saunders

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
JULY 16, 2014

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 15250-13

2014-1004

IN THE MATTER OF RUBY SAUNDERS,
NEW JERSEY STATE PRISON.

James R. Zazzali, Jr., Esq., for appellant Ruby Saunders (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Ernest Bongiovanni, Deputy Attorney General, for respondent New Jersey State Prison (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: March 7, 2014 Decided: April 14, 2014

BEFORE **JOSEPH LAVERY,** ALJ t/a:

Ruby Saunders, appellant, brings this appeal from her termination as a Correction Officer Recruit, New Jersey State Prison, Department of Corrections. She has been charged with (a) failure to comply with an order to adequately search a cell, and (b) refusing to obey an order to properly search it a second time.

The **appointing authority, New Jersey State Prison**, contests the appeal, and asks that appellant's removal be upheld.

Today's Initial Decision, after de novo consideration, upholds the appointing authority's charges, and imposes a penalty of removal.

PROCEDURAL HISTORY

This is an appeal filed in the Office of Administrative Law (OAL) on October 17, 2013, pursuant to L. 2009, c. 16, supplementing Title 40A of the New Jersey Statutes (N.J.S. 40A:14-200 through -212) and amending N.J.S. 40A:14-150 and N.J.S. 40A:14-22.

On November 27, 2013, the case was assigned for hearing by the Acting Director and Chief Administrative Law Judge. The proceedings convened before the undersigned on January 28, and February 10, 2014. Appellant requested post-hearing briefs, pursuant to L. 2009, c. 16 agreeing to exempt the time consumed for that purpose. The final letter-brief was date-stamped as filed in the OAL on March 7, 2014, at which time the record closed.

STATEMENT OF THE CASE

Background:

Many of the material facts are not in dispute:

On August 17, 2013, appellant was a Correction Officer Recruit (COR) in New Jersey State Prison. On that date, just before 10:00 a.m., a Special Operations Group (SOG), which was a mobile emergency response team "activated" from Central Office, was called in to conduct an elaborate search. That group of about twenty-five select correction officers, was soon complemented by some twenty-five additional local staff correction officers, including appellant and other CORs. Their combined effort focused on a specific section of New Jersey State Prison (NJSP; the prison). The unit involved

was located within West Compound, and was known as 4-Left (or 4-Up), housing some fifty-seven inmates.

This full-blown officer response was prompted by discovery the night before during the Unit C shift (10:00 p.m. to 6:00 a.m.) in 4-Left of dangerous contraband in the form of a live nine-millimeter bullet. Of the two groups of officers, the local officers assisting the SOG were under the command of Correction Lieutenant John Doyle, the Operations Lieutenant from the prison. Lieutenant Doyle was aided in his supervision by Correction Sergeant Zsuzsanna Rogoshewski, who was an immediate supervisor of the COR's, and appellant in particular. The SOG was headed by Sergeant Timothy Morris, its team leader.

When Sergeant Morris and the SOG arrived at the prison at 9:55 a.m., a strip-search of the inmates was undertaken in their cells, before they were removed to the gym for the duration of the search. After a video recording of the empty cells, and with the inmates now gone, the full complement of local officers began gathering in front of Lieutenant Doyle by the 4-Left desk. At approximately 11:10 a.m. Lieutenant Doyle gave a brief talk to the assembled officers before the actual cell search began. When this was done, at about 11:20 a.m. the officers lined up single-file. They each were sent by SOG Senior Correction Officer Iaccovelli to the particular cells to be examined. Appellant, seventh in line, was sent to Cell 57. Over the course of this activity, correction officers found prohibited items in several cells and on the person of one inmate. One of the discoveries was a broken brush handle with a sharpened end for use as a weapon. By about 1:30 p.m., the work was completed and a clean-up crew was brought in, ending the search.

It was in the midst of the search itself that appellant became embroiled in the controversy here at issue. When she had finished searching Cell 57 to a degree which she believed was satisfactory, appellant returned to her immediate supervisor, Sergeant Rogoshewski, for another assignment, if needed. The sergeant then inspected Cell 57. She concluded that the search was inadequate, and told appellant to do it again. Here,

the recitation of facts diverge. Sergeant Rogoshewski contends that appellant had failed to search properly, and disobeyed her order to return and do so. Appellant answers that she had searched as required, did not disobey the order, and only followed protocol when seeking relief from the sergeant's verbal mistreatment by asking to call the area lieutenant.

As it happened, SOG Sergeant Morris had heard part of their conversation, and affirmed Sergeant Rogoshewski's version of the talk. Both he and Lieutenant Doyle agreed, too, after inspecting the cell themselves, that a thorough search had not taken place. In any event, the upshot of the confrontation between Sergeant Rogoshewski and appellant was that the sergeant relieved her from her duty. Whether the sergeant called another supervisor not involved in the search, Sergeant Robin Washington, stationed in the nearby West Rotunda, to have appellant write a report known as a "special" is further in testimonial dispute.

Once appellant had left, Sergeant Rogoshewski went at once to Lieutenant Doyle and shared her version of the event. The perceived defective search was remedied by assigning a SOG officer, SCO J. Hernandez to a repeat search. When he was finished, this officer reported the task as requiring one-and-one-half hours to complete.

After a flurry of reports describing each officer's part in what had transpired between appellant and Sergeant Rogoshewski, a preliminary notice of disciplinary action (PNDA) issued on August 26, 2013, and a final notice of disciplinary action (FNDA) followed on October 2, 2013, terminating appellant from her employment.

These proceedings ensued.

Arguments of the Parties:

Respondent Department of Corrections' case:

The appointing authority presented both witnesses and exhibits in support of their position:

Lieutenant John P. Doyle[1] testified that he was called by Major Schmiele to lend a hand with the SOG search because of his past experience with that elite group. He stressed that the SOG officers are selected with particularity after much testing, and given special training in all manner of emergent responses, such as riot control, building entry, transport, specialized searches and the like. In this instance, the importance of a thorough and complete examination of cells was paramount. A nine-millimeter-round had been discovered. This suggested that a gun might well be concealed somewhere on the unit.

Conscious of the potentially serious risk, at about 11:10 a.m. or 11:15 a.m., Lieutenant Doyle recalled, he gathered the officers involved near the 4-Left assignment desk for special instructions just before entering the cells, telling them of the urgent motive for the search. He specifically emphasized their important responsibilities, stressing that the search should be detailed, with probing extending to every aspect of the cells and the inmates' personal property. COR's, the lieutenant pointed out in testimony, know how to search. During their academy training and during all the months in their class title, they perform searches twice a day, every day.

[1] John P. Doyle has since been promoted, but his title of lieutenant at the time in issue will be retained throughout this initial decision to avoid confusion.

When Sergeant Rogoshewski reported to him it was 11:30 a.m., by a check of his watch. Lieutenant Doyle testified that the sergeant said appellant had left Cell 57 at 11:26 a.m. He knew that the officers had entered the cells at 11:20 a.m. With the sergeant, he went to the cell, which, like the others on 4-Left was the largest cell-type in the prison. He estimated their size as 8x12 or 8x14, some holding large amounts of property, depending on the length of the occupants' imprisonment.

Lt. Doyle disclosed that he had personally engaged in or had supervised thousands of cell searches. Yet, in contrast to his experience, when he entered Cell 57, he could not see how it could have been fully searched. Viewing the cell and the amount of personal property, he found that of the many containers, only a few had lifted lids. Their contents remained meticulously arranged. Clothes and other belongings were neatly folded. The remaining property was placed about in orderly fashion, in such a way that no one could believe they could have been thoroughly examined. When told appellant had searched the cell in six minutes, the lieutenant remembered, he may have responded, "Are you kidding me?"

The lieutenant acknowledged that he was not present during the interaction between appellant and Sergeant Rogoshewski.

Sergeant Timothy Morris, the SOG Team Leader, testified that, from nearby, he had heard Sergeant Rogoshewski order appellant back into the cell and heard appellant reply that she had to make a phone call. This took place by the desk area where the staff had received assignments. Many staff were present. He concluded this was "gross insubordinance," but he couldn't stop to deal with the offense. The delay would deter him from the ongoing activity of the search, busy as that mission had been from the start, with the many officers, prisoner-movement, and video activities involved.

Evaluating the nature of the search, Sergeant Morris pointed out that when SOG is on the scene, it is recognized by all officers in Corrections that serious trouble exists, since SOG is the emergency response team. As an adjunct instructor at the academy,

he knew that appellant would have been aware of this from her introductory training. In the event here at issue, the seriousness of finding a live round would have demanded a "thorough" search, not a "cursory" check, the sergeant stressed. The two types of scrutiny are vastly different, in his experience. He personally taught cell-searches at the academy. "Cursory" searches are not unusual, he stated. They could occur more than once during any particular day, and last perhaps five-to-fifteen minutes, depending on the property involved.

In contrast, "thorough" searches are lengthy and elaborate, the sergeant noted. This process would include opening "everything," taking apart mattresses, opening socks, checking pillows and searching every location in the cell itself and the property in it. In the instance of Cell 57, this is the attention to detail which was called for, he stated, yet he could see himself when called on to enter the cell that this had not been done. Not many of the belongings of the two inmates had been disturbed. Their containers were closed. Beds were still made, one ruffled but a little. Shoes were undisturbed. That day mattresses had been brought down to X-ray. Those of Cell 57 were not. It appeared to the sergeant as if the inspecting officer had simply walked in and then walked out. When he assigned one of his own SOG officers to re-search the cell after being told by Lieutenant Doyle and Sergeant Rogoshewski what had transpired, that officer, SCO J. Hernandez, later reported that the search consumed approximately an hour-and-a-half of his time (Resp.'s Exh. F).

In testifying as to what occurred in the confrontation with appellant on August 17, **Correction Sergeant Zsuzsanna Rogoshewski**, the sergeant who was appellant's immediate supervisor on this mission, stated that the search in which appellant was a participant was "absolutely non-routine." The hunt was for weapons including especially a gun, because of the bullet found. She stated that under her supervision as area sergeant, there were some twenty-five officers engaged, and the SOG had brought with them roughly the same number. The searchers were told that they had to look thoroughly through the cells. This meant along walls, in beds, everything part of the cell itself, such as light fixtures, outlets, toilets, shelves, and plumbing; in addition to this all

property, including garments, their pockets, seams and collars had to be examined. Bins would have to be emptied; whatever the inmates purchased for their cells would have to be checked. The sergeant observed that all the officers involved had training in searches, as well as ample experience.

Sergeant Rogoshewski stated that when inspecting Cell 57 after appellant had said she had finished, she found bins containing food, books and other goods neatly-placed and apparently untouched. Clothing appeared smooth, ironed, folded and hung in careful order including those on clotheslines strung across the cell. One bin lid had been opened. Only one bed appeared to have been touched. The sergeant estimated that the entire search conducted by appellant had consumed six minutes from the time the officers were sent into the cells at 11:20 a.m. Seeing this, she brought Lieutenant Doyle to the cell to confirm her assessment that the cell had not been properly examined. He agreed that an adequate search had not been done.

Sergeant Rogoshewski recalled bringing appellant back into the area and explaining to her that the cell had to be re-searched. She recalled explaining to appellant in detail how the grid method of search was to be followed, sector-by-sector, over the entire area, with hands-on scrutiny given every item and segment. Appellant at the end of this instruction acknowledged that she understood.

After this reassignment and instruction, the sergeant stated she left the cell. A few seconds later, appellant emerged, saying: "I'm not searching that cell again. I'm going to go down and make a phone call," and then walked away. As she did so, Sergeant Rogoshewski recalled, she at once relieved appellant from duty. She told appellant: "Report to Sergeant Washington, you are dismissed from the detail." Within the sergeant's recollection, appellant had neither asked nor suggested that she be permitted to go up the chain of command.

Sergeant Rogoshewski added that, through a phone call to Sergeant Washington, she directed that appellant write a "special" report. She herself went to

Lieutenant Doyle as next in chain of command to report the incident, and wrote her own report (Exh. D) of what had transpired. When appellant failed to write her report, Operations Lieutenant Doyle issued a second order, and appellant complied.

Sergeant Rogoshewski denied that she had been aggressive when reassigning appellant to search Cell 57, but admitted she may have used the word "shit" when referring to the property to be re-examined. The word, in her experience, was not an uncommon usage in the prison, especially in a tense situation. She did not intend to belittle or humiliate appellant. There was no personality conflict involved, she added, in this single occasion when the two had performed a search together.

The sergeant also declared that she was without knowledge of any speech impediment which appellant might have labored under, and had not at any time referred to appellant as "slow" or "stupid." The incidents and settings described by Sergeants Sexton and Washington were not events fitting within her recollection. Neither did she ever give instructions to "tread lightly" with appellant because of her disability. Sergeant Rogoshewski insisted that her decision to seek discipline on August 17, 2103, was triggered by appellant's refusal to search a second time, which was a failure to obey a direct order.

In post-hearing letter-summation, the appointing authority outlined its interpretation of the record, and argued that appellant's conduct was sufficiently egregious to warrant removal, and to disregard the concept of progressive discipline.

Appellant's case in reply:

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Appellant answered the charges through her own testimony, as well as through a witness and exhibits:

Correction Sergeant Carmen A. Sexton, who had not been part of the search on August 17, offered her recollection of remarks made at a time and place in the prison

separate from those in issue. She thought this unrelated incident occurred in the rotunda area at the end of April or beginning of May in 2013. She recalled that Sergeant Rogoshewski, in a conversation with another officer, had referred to appellant as "slow," concluding that she didn't belong in the facility. Overhearing this, Sergeant Sexton intervened. She had interpreted the remark to mean appellant "wasn't all there." Sergeant Sexton, who had herself trained appellant, told Sergeant Rogoshewski that this was not the case, explaining that appellant instead was simply affected by a speech impediment. She remembered that Sergeant Rogoshewski offered no reply.

Drawing on her eighteen years in Corrections and experience as an adjunct instructor at the academy, Sergeant Sexton declared that there are not two kinds of searches. Each search is important and in need of the same consistent degree of thoroughness. Live ammunition and even a gun had been found before. Moreover, though she had not been present, in her view, the talk preceding the search had to have been more in the nature of a "pep talk," and the presence of SOG was not unusual, being more likely intended, as always, to keep everyone on their toes.

In similar testimony, **Correction Sergeant Robin Washington** believed that a search of a cell similar to Cell 57, as described, could be conducted within a fifteen-minute window of time, depending on the amount of inmates' property in the cell. However, she did agree that officers could be given special precautions about the method and extent of search. Like Correction Sergeant Sexton, she herself had not participated in the search of 4-Left. Sergeant Washington stated that, instead, she was stationed elsewhere, in the rotunda of West Compound, across from 4-Unit. The sergeant was sure that on that day the chain of command was not to the operations lieutenant, but to the area lieutenant.

Sergeant Washington fully denied that she had ever received a call from Sergeant Rogoshewski asking her to direct appellant to file a "special." She also remembered hearing Sergeant Rogoshewski at some unspecific time refer to appellant as "slow," though she had not filed a report to make known what she saw as an offense.

Sergeant Washington added that she had not herself spoken up either, being preoccupied at that moment with an inmate movement.

Testifying on her own behalf, **Ruby Saunders, appellant**, stated that she had searched Cell 57 as she was trained, employing the "grid" system. She covered the entire cell, and all the property in it, taking fifteen minutes, not six. The officers had not been told there was a bullet involved during Lieutenant Doyle's speech of less than a minute, but she had heard this elsewhere. When she left the cell, appellant recalled, and before she could move on to the next, Sergeant Rogoshewski called her back, telling her, "Go through all this shit again," in a loud and degrading manner. Appellant testified that she did not refuse the order to re-search. Instead, she complied. She did so by returning to Cell 57, where she briefly conducted a visual search. At this point she decided she needed to speak with a supervisor, given the sergeant's belittling and humiliating treatment and considering her unhappy history with Sergeant Rogoshewski (Exh. P-1). She felt threatened and professionally embarrassed. When, in conformance with protocol, appellant asked her for permission to ascend the chain of command, the sergeant relieved her of duty because of her request.

Appellant maintained that she had a speech impediment serious enough to require therapy when she was young and at school. The disability reappears as an adult when she becomes nervous, and Sergeant Rogoshewski discriminated against her because of it. This triggered her appeal to the DOC Equal Employment Division (Exh. P-1). Moreover, appellant asserted, the sergeant in her dealings with her was short-tempered, impatient, prone to cursing, and persistent in berating her. Appellant did not agree that she was "slow," having attended college for a few years.

Post-hearing, appellant offered the facts of record as proof of Sergeant Rogoshewski's bias, intolerance, and lack of credibility. She argued for dismissal of the charges or, at most, progressive discipline short of termination.

Burden of proof:

The burden of persuasion falls on the agency in enforcement proceedings, such as those in which it is sought to prove an employee has engaged in violations susceptible to removal as a penalty, under controlling regulations, Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The agency 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 a given conclusion, Bornstein v. Metropolitan 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).

Findings of fact:

To resolve disputes of material fact I make the following **FINDINGS:**

1. With the discovery of a nine-millimeter bullet round on the immediately preceding shift, and with the arrival of the Special Operations Group (SOG) to begin a cell search on 4-Left, West Compound, all correction officers involved understood that this search was to be a non-routine undertaking on August 17, 2013.

2. Before the assignment of officers to search the cells on 4-Left, Lieutenant Doyle gave an approximately five-minute speech to the officers involved. He stressed the importance of the search, the security at risk because of the found bullet, and the need for the officers to probe every aspect of the cells to be searched, as well as the personal property within.

3. Appellant understood that her assignment to Cell 57 was for an urgent, non-routine search.

4. When appellant was assigned to Cell 57 she performed only a cursory inspection. She did not open all containers or search their contents. She did not strip both beds, empty surrounding boxes, review pockets, seams, or collars of the various clothing arranged throughout the cells, or scrutinize the detailed aspects of the cell area itself.

5. Appellant had entered Cell 57 at 11:20 a.m. She left the Cell at 11:26 a.m., having stayed in the cell for a total of six (6) minutes.

6. After appellant came from Cell 57 for reassignment, Sergeant Rogoshewski inspected the cell and ordered appellant to re-do the search. Appellant, after several seconds in the cell, emerged and declared that she would not do it. Instead, she was going to leave and make a phone call. Appellant neither asked nor suggested that she be permitted to go up the chain of command with a complaint.

7. The next level in the chain of command was Lieutenant Doyle, the operations lieutenant in charge of the search, not the area lieutenant.

8. After appellant's refusal to search the cell, Sergeant Rogoshewski relieved appellant from duty, and told her to return to Sergeant Washington.

9. It was reported that SOG Senior Correction Officer J. Hernandez searched Cell 57 after appellant, taking approximately one-and-one-half hours to complete the task (Resp. Exh. F).

10. There is no preponderating evidence that Sergeant Rogoshewski directed Sergeant Washington to compel appellant to fill out a "special" report.

11. There is no preponderating evidence that Sergeant Rogoshewski had referred to appellant at any time as "slow" or "stupid."

ANALYSIS AND CONCLUSION

Analysis:

The charges:

The appointing authority, in its final notice, has specified those regulations on which it relies to justify its disciplinary action. They are:

> N.J.A.C. 4A:2-2.3(a) General Causes 1. Incompetency, inefficiency, inefficiency or failure to perform duties: 2. Insubordination: 7. Neglect of duty; 12 Other sufficient cause, HRB 84-17 AS AMENDED, (B-2) Neglect of duty, loafing, idleness or willful failure to devote attention to tasks which could result in danger to persons or property. (B-9) Incompetence or inefficiency. (C-9) Insubordination: Intentional disobedience or refusal to accept order, assaulting or resisting authority, disrespect or use of insulting or abusive language to a supervisor (C-11). Conduct unbecoming an employee. (D-7) Violation of administrative procedures and /or regulations involving safety and security. (E-1) Violation of a rule, regulation, policy, procedure, order or administrative decision.
> [Final Notice of Disciplinary Action, October 2, 2013; Resp.'s Exh. A]

The asserted facts on which DOC grounds these charges are set forth in the same document, and are quoted here:

> On August 17, 2013 NJSP was conducting a search of the 4Left (General Population) Housing Unit. A 9mm firearms round had just been found on the unit, so, prior to the search, Lt. Doyle advised the Search Team of the reason, and importance of the search. COR Saunders was a member of this team. COR Saunders was assigned to a cell #57 housing two inmates, by Sgt. Rogoshewski. After six (6) minutes of searching the cell COR Saunders reported to Sgt. Rogoshewski that her search was completed, and no contraband was found. The Sergeant ordered COR Saunders to search the cell, again. She refused, and told the Sergeant

she had to make a phone call. COR Saunders was relieved of her duties, and ordered to write a report on the incident.

[Ibid]

The search:

The foregoing DOC description of the incident on August 17, 2013, matches the rules charged as having been violated by appellant. The description is also consistent with the FINDINGS, supra. The State's witnesses, Lieutenant Doyle, SOG Sergeant Morris and Sergeant Rogoshewski were believable in their demeanor and in their recitations of fact, and the testimony was consistent. Lieutenant Doyle and Sergeant Morris both told their officers with emphasis (a) that this was an especially non-routine search calling for extreme thoroughness, and (b) that there was a risk that a gun could be in the cells, because of the nine-millimeter bullet. The evidence predominates that all officers knew this, especially including appellant.

In light of this information, whether the search conducted by appellant was six minutes as Sergeant Rogoshewski maintains, or fifteen minutes according to appellant's witnesses, the effort involved had to have fallen short. This was a high-tension search. In a large cell with two inmates and their accumulated personal property no reasonable viewer with the individual experience of the three DOC witnesses could believe otherwise. It is relevant that unchallenged was SOG officer Hernandez's report stating that his search of Cell 57 required an hour-and-one-half to complete. Sergeant Sexton's declaration that all searches are conducted with the same degree of thoroughness is not persuasive, given the practice of multiple daily searches by COR's and SCO's and the believable testimony of Sergeant Morris to the contrary. If such search daily searches were to be carried out to the same degree, the consumption of time would be irrationally impractical. The intensity of these exercises of necessity would have to vary because of the circumstances peculiar to each cell, and because of the

nature of objects sought. With multiple searches daily, it would not be possible to match the unrebutted degree of inspection carried out by SCO Hernandez in Cell 57. (Resp. Exh. F).

In sum, the training, frequency of cell searches undertaken by CORs, and the rules with which appellant concededly had been made aware of at the outset of her career are preponderating proofs (See esp. Resp. Exh. L, at page 5 describing search elements). Consequently, it must be concluded that appellant knowingly chose not to conduct a search consistent with demands of that day and with the direct instructions of Lieutenant Doyle.

Sergeant Rogoshewski's order to search Cell 57 a second time:

As the Findings, supra state, appellant did refuse the order to re-search Cell 57.

Sergeant Rogoshewski and Sergeant Morris were credible in their demeanor and in the content of their testimony. Sergeant Morris, a member of SOG, and not a local officer with ties in the prison, had no apparent personal interest which would influence his corroboration of Sergeant Rogoshewski's testimony on this issue. As such, he was an independent eyewitness. This was true as to appellant's statement that she was leaving to make a phone call, and it was likewise true as to his assessment of the conditions in Cell 57 after appellant had concluded her six-minute search activity.

Appellant and her witnesses sought to establish that Sergeant Rogoshewski had a bias against her, driving the sergeant's decision to falsely report appellant's neglect and insubordination. The bias, in their view, stemmed from the sergeant's mistaken reaction to appellant's speech impediment. This impediment, they assumed, can sometimes lend a false impression that appellant has limited mental acuity. They alleged that the sergeant wrongly construed this personal difficulty as evidence of

appellant being "slow" or "stupid," and that the sergeant abused her authority over appellant because of it. Moreover, they claim that she publicly used these terms in the workplace to demean appellant. None of these assertions has been supported by a preponderance of credible evidence.

Sergeant Rogoshewski was believable in her denial of these charges, which are essentially a defense imposing an affirmative obligation on appellant to offer countering evidence. More compelling is the fact that at hearing appellant did not patently manifest any impairment which would support the witness' claim. Further, the reliability of the witness' descriptions of Sergeant Rogoshewski is suspect when taken together with their plainly untenable assertions that the search of Cell 57 could be accomplished in fifteen minutes.

Finally, to undermine the sergeant's testimony, appellant described her as impatient, abusive and profane. Appellant charged further that the latter was bent on attacking, antagonizing, humiliating, and embarrassing her, which left appellant feeling professionally threatened. Nevertheless, other than the unsupported allegations, no evidence preponderates that this description is accurate. More to the point, if it were to be assumed that appellant's discomfort with Sergeant Rogoshewski's supervisory demeanor was for good reason, rough treatment in itself does not translate into preponderating evidence that the sergeant was dishonest, either generally or in her testimony at hearing, combative as it sometimes became. Neither does it ameliorate appellant's decision to not obey orders, or to search neglectfully. What prevails in evidence is the testimony of Lieutenant Doyle and Sergeant Morris in support of the sergeant. Collectively, the testimony which persuades is that appellant searched inadequately in just six minutes, and that she then refused Sergeant. Rogoshewski's order to return and to examine Cell 57 as instructed.

What is not persuasive is the testimony that appellant did not write the "special" which Sergeant Rogoshewski "advised" her to complete. This ostensibly was accomplished through a call to Sergeant Washington after appellant walked away.

Sergeant Washington categorically denies receiving the call. Whatever the facts may be, the proofs are in less than equipoise which would demonstrate appellant's awareness of Sergeant Rogoshewski's claimed order. In contrast to this charge is the undisputed, prompt compliance by appellant with Lieutenant Doyle's order to write a report. A willful refusal by appellant to obey is therefore not apparent. For these factual reasons, the State's evidence does not preponderate.

There is also a determinative legal factor which takes precedence: No clearly defined charge in the final notice of disciplinary action is present. It cannot unequivocally be read to warn of prosecution for failure to write a "special," as commanded by Sergeant Rogoshewski. The specifics of the charge state only that appellant was "ordered to write a report on the incident." (Resp. Exh. A). This is what appellant did. Since charges involving penalty must be narrowly and precisely construed, the lack of clarity on this point falls in her favor.

Penalty:

Appellant is without any record of discipline during the brief period of her employment as a correction officer recruit.[2] She has one record of commendation for attention to detail in searches (Exh. N). It is not disputed that her single counseling for raising her voice and speaking over a supervisor, Ibid, does not qualify as a discipline but, is rather, an instruction.

Ordinarily, any penalty would be considered within the context of an employment history of discipline, or lack of it. West New York v. Bock, 38 N.J. 500, 523 (1962). Nevertheless, this progressive discipline policy is not inflexible. It is a concept which may be set aside when the offense under consideration is sufficiently egregious. In re Stallworth, 208 N.J. 182, 199 (2008).

[2] Documents submitted, as agreed, post-hearing have been reviewed. They will be considered for ID only as Resp. Exh O. Their content amounts to no more than reports, and do not qualify as preponderating proof of misconduct or disciplinary penalty. For any other purpose, i.e., conflict between Sergeant Rogoshewski and appellant, they are unduly prejudicial and without weight, lacking in-depth testimonial exploration. N.J.A.C. 1:1-15.1c2, N.J.A.C. 1:1-15.5b

In appellant's case, the level of seriousness accompanying the offenses charged is enhanced by her law enforcement title. The reported judicial case law is replete with recognition of the special nature of that status, with respect for the unusually great responsibilities imposed on law enforcement, and with affirmance of the strict accountability demanded of an officer:

In the case of In re Carter, 191 N.J. 474, 485-486 (2007), involving a police officer who slept while on duty, the Court held:

> In matters involving discipline of police and corrections officers, public safety concerns may also bear upon the propriety of the dismissal sanction. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580, 410 A.2d 686 (1980) (affirming appellate reversal of Board decision to reduce penalty from dismissal to suspension for prison guard who falsified report because of Board's failure to consider seriousness of charge); In re Hall, 335 N.J. Super. 45, 51, 760 A.2d 1148 (App. Div. 200) (reversing Board's decision to reduce penalty imposed on police officer for attempted theft from dismissal to suspension), certif. denied, 167 N.J. 629, 772 A.2d 931 (2001); Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06, 633 A.2d 577 (App. Div. 1993) (holding that it was arbitrary, capricious, or unreasonable to reduce penalty from removal to six months suspension for prison guard who gambled with inmates for cigarettes), certif. denied, 135 N.J. 469, 640 A.2d 850 (1994)

Indeed, as our Appellate Division has recognized:

> A police officer is a special kind of public employee. His primary duty is to enforce and uphold the law . . . He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have respect of the public.
> [Twp. of Moorestown v. Armstrong, 898 N.J. Super. 560, 566, 215 A.2d 775 (App. Div. 1965), certif. denied, 47 N.J. 80, 219 A.2d 417 (1966)]

In today's case, first, appellant was neglectful in a search whose underlying goal was to learn whether a firearm had been concealed, and to recover it, if so. By her lackluster effort, appellant risked contributing to a potential threat of the most serious nature. Had a weapon been present, left undiscovered, its use would have profoundly

affected the security and safety of prison officers, the inmates and appellant herself. Though, after the fact, no weapon was found in Cell 57, this would not relieve her from being held accountable for her willful neglect in the face of an instruction to search diligently.

Second, in refusing to comply with Sergeant Rogoshewski's direct command to re-search, appellant disregarded the fundamental obligation of a correction officer in a paramilitary organization: to comply with orders from a superior officer. Appellant did have the right to bring any grievance over Sergeant Rogoshewski's direction up the chain of command—after she obeyed. Her duty was to:

> Promptly follow all orders issued by competent authority. Any question as to the appropriateness of a reasonable order may be brought to the attention of the Unit Captain, Shift Commander or Area Lieutenant after the order has been carried out.
>
> [Resp. Exh. L, pages 4-5, C. Staff Conduct; emphasis added]

This appellant did not do. Such misconduct, left unpunished, weakens the coherence of the correction officer corps. It threatens as well the good order and protections of the facility. Consequently, for all the foregoing reasons, the penalty of termination is necessary "to maintain the security, safety, and operational effectiveness of the institution." Ibid.

Conclusion:

I CONCLUDE, THEREFORE, that on April 25, 2013, appellant did not conduct a complete or adequate search of Cell 57 after being ordered to do so. **I CONCLUDE** further that appellant refused to follow a direct order to correct this deficiency with a complete and proper search. **I CONCLUDE** additionally that appellant's behavior was in violation of those civil service rules and departmental regulations relied on by the appointing authority cited its Final Notice of Disciplinary Action dated October 2, 2013

(Resp. Exh. A). I **CONCLUDE** finally and de novo that termination of appellant's employment as a Correction Officer Recruit is the appropriate penalty.

ORDER

I **ORDER THEREFORE** that **removal** of appellant **Ruby Saunders** from her class title of Correction Officer Recruit, be, and hereby 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. 40A:14-204.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, 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.

April 14, 2014
DATE

JOSEPH LAVERY ALJ t/a

Date Received at Agency: 4-14-14

Date Mailed to Parties: 4-14-14

LIST OF WITNESSES:

For appellant:

Ruby Saunders, appellant
Carmen A. Sexton
Robin Washington

For respondent:

John P. Doyle
Timothy Morris
Zsuzsanna Rogoshewski

LIST OF EXHIBITS:

For appellant:

P-1 Department of Corrections Equal Employment Division Determination Letter, dated October 24, 2013
P-2 through P-9 Identification Only

For respondent:

Exhibit:

A. Final Notice of Disciplinary Action, dated October 2, 2013
B. Preliminary Notice of Disciplinary Action, dated August 26, 2013
C. Special Custody Report of Lieutenant John Doyle, dated August 17, 2013
D. Special Custody Report of Sergeant Zuzsanna Rogoshewski, dated

August 17, 2013, time of report 11:20 a.m.

E. Special Custody Report of Sergeant Zuzsanna Rogoshewski, dated August 17, 2013, time of report 11:20 a.m.

F. Special Custody Report to Sergeant Timothy Morris from Corrections Officer J. Hernandez, August 17, 2013

G. Inmate Roster with cell search assignments

H. Special Custody Report by Ruby Saunders to Sergeant Rogoshewski, August 17, 2013

I. Identification Only

J. Identification Only

K. Identification Only

L. Internal Management Procedures #AIMSJSP.402, pages, 4, 5, 6, 9 and 10

M. Record of timeline of search

N. Work history, April 17, 2013

O Identification only