



In her initial decision, the ALJ upheld the charges related to the appellant's lack of candor with the investigation. However, she dismissed all of the other charges including those related to the disclosure of the information. In this regard, she found the appellant's testimony credible about the incident and his actions. Based on these findings and other mitigating factors, the ALJ recommended that a 90 working day suspension was the appropriate penalty.

In its exceptions, the appointing authority makes myriad arguments as to why it believes the ALJ erred in both her findings and conclusions. Included in these arguments are that the appellant admitted that he disseminated the information without authorization, which is a violation of its policy; that he should be found guilty of falsification since he "blatantly" and "outright" lied during his interview; and that his testimony was not credible.

Upon its *de novo* review, the Commission agrees with much of the ALJ's assessment of the record. In this regard, the Commission is not persuaded by most of the appointing authority's exceptions. However, the Commission does agree that the appellant should be found guilty of violating the policies regarding disseminating the information without proper authorization. Regardless of who the appellant disclosed the information to or whether he knew the policy, he admittedly disclosed the information without authorization. However, while the upholding of these additional charges provide a basis for an increased penalty, since the Commission agrees with the ALJ's stated reasons for the original reduction of the penalty to a 90 working day suspension, the inclusion of those charges does not warrant the appellant's removal. Accordingly, the Commission finds that the appropriate penalty in this matter is a 120 working day suspension.

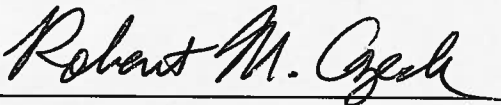
### ORDER

The Commission finds that the appointing authority's action in removing the appellant was not justified. Therefore, the Commission modifies the penalty to a 120 working day suspension. The Commission further orders that the appellant be granted back pay, benefits, and seniority from the conclusion of his suspension through the date of actual reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

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

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to R. 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 4<sup>TH</sup> DAY OF FEBRUARY, 2015



Robert M. Czech  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

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

Attachment



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

**INITIAL DECISION**

OAL DKT. NO. CSV 7693-14

AGENCY DKT. NO. 2014-3156

**IN THE MATTER OF DEREK  
JOVANOVIC, NEW JERSEY  
STATE PRISON, DEPARTMENT  
OF CORRECTIONS.**

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**Robert R. Cannan., Esq., for appellant (Markman & Cannan, LLC, attorneys)**

**Kelly Lichtenstein, Deputy Attorney General, for respondent (John J. Hoffman,  
Acting Attorney General of New Jersey, attorney)**

Record Closed: October 17, 2014

Decided: December 1, 2014

**BEFORE SARAH G. CROWLEY, ALJ:**

**STATEMENT OF THE CASE**

Appellant, Derek Jovanovic, is a Correction Officer Recruit (COR) at New Jersey State Prison, Department of Corrections (NJDOC), who was hired on March 25, 2013. Respondent seeks to remove appellant from his position because he allegedly violated several policies regarding the dissemination of information and made several misrepresentations during the investigation into these violations. The appellant alleges

that the conduct did not constitute a violation of these policies and that, even if a violation were found to have occurred, the penalty of removal is not warranted.

### **PROCEDURAL HISTORY**

On April 2, 2014, the respondent served a Preliminary Notice of Disciplinary Action on appellant seeking his removal. Following a hearing held on June 2, 2014, respondent served a Final Notice of Disciplinary Action seeking his immediate removal, effective June 14, 2014. The appellant requested a hearing and the matter was filed at the Office of Administrative Law (OAL), on June 19, 2014, to be heard as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on October 2 and 7, 2014. The parties submitted post hearing submissions on October 17, 2014, and the record closed on that date.

### **SUMMARY**

Appellant was hired as a Correction Officer Recruit, by the NJDOC on March 25, 2013. Prior to working at the NJDOC, Officer Jovanovic was employed as a Class II Special Officer in Asbury Park. He remained friends with several officers on the Asbury Park Police force. On or about February 16, 2014, Officer Jovanovic sent a text message to, and had a conversation with a former colleague at the Asbury Park Police Department, Patrolman Michael Casey. Officer Jovanovic advised Patrolman Casey that there had been an increase in fighting at the prison, and told him there was "almost a full blown riot in the mess hall." He further advised Patrolman Casey that a letter was found in a cell which said that gang members were targeting female officers as a result of "Operation Dead End," which was a sting operation resulting in the arrest of a number of gang members in Asbury Park.

As a result of Officer Jovanovic's communications with Patrolman Casey, he prepared and distributed a memo to all officers alerting them to the possible targeting of female officers. NJDOC was advised of the communication by the Monmouth County

Prosecutor's office and conducted an investigation. As a result of the investigation, Officer Jovanovic was charged with violating DOC rules regarding the dissemination of confidential information and for not being truthful in the investigation.

### TESTIMONY

#### **For respondent:**

**Michael Casey**, a patrolman for the Asbury Park Police Department testified on behalf of NJDOC. Patrolman Casey advised that he had worked with Officer Jovanovic for a few years at the Asbury Park Police Department and that they were friends. He testified that he talks to him from time to time and that he received a text message from him on February 16, 2014. Officer Jovanovic advised him that there was almost a full blown riot in the jail and that a letter was found in an inmate's cell regarding female officers being targeted as a result of Operation Dead End. Patrolman Casey testified that he did not advise Officer Jovanovic that he was going to prepare a memo, and that he believed that Officer Jovanovic was genuinely concerned about the safety of his fellow officers.

**Investigator Nancy Zook** is a principal investigator for the NJDOC. She conducted the investigation into this matter. She testified that on or about February 16, 2014, NJDOC was contacted by the Monmouth County Prosecutor's office regarding a bulletin prepared by Patrolman Casey of the Asbury Park Police Department. The memo stated that there was violence in the prison and that they had found a letter in an inmate's cell which stated gangs were targeting female officers. The matter was referred to her for an investigation into the truth and veracity of the allegations, as well as the possible violation of NJDOC policies by Officer Jovanovic's disclosure of these facts. Her main concern was to determine if there was a credible threat. Investigator Zook confirmed that she was aware of the riot in the mess hall and the attack on a female officer, but she was not aware of the letter found in an inmate's cell. She testified that she never followed up on whether a letter was found in an inmates' cell, but

the prison administrator was "very concerned" about the matter. It was unclear from her testimony whether he was concerned about the potential threat or was concerned that he had to hear about it through outside law enforcement.

Investigator Nancy Zook and Investigator Kevin Koch conducted a videotaped interview with Officer Jovanovic. They called him to their office and told him to bring a union representative. They did not advise him of the nature of the investigation. The video of the one-hour interview was viewed during the hearing. Officer Jovanovic was visibly shaken during the interview, and Investigator Zook's demeanor was very aggressive. It was clear that Officer Jovanovic had no idea what the interview was about, but he was obviously alarmed about the serious nature of the interview, especially when Investigator Zook told him that criminal charges could be brought against him.

Officer Jovanovic was questioned about his relationship with Asbury Park Patrolman Michael Casey. Officer Jovanovic advised that he knew Michael Casey from his prior employment with the Asbury Park Police Department. He told Investigator Zook that he and Patrolman Casey were friends and that they talked occasionally. Officer Jovanovic admitted that he had a conversation with Patrolman Casey on or about February 16, 2014, but he was initially reluctant to reveal any details of the conversation and initially denied telling Patrolman Casey anything. After Officer Jovanovic was given the opportunity to take a break and talk to his union representative he advised the investigators that he told Patrolman Casey about a riot in the jail and that a letter had been found in a cell which threatened female officers. Officer Jovanovic stated in the video that he thought there was a real threat and he should let local law enforcement know. He was not aware that Patrolman Casey was going to reduce the information to a memo, and he did not know that he was violating any rules by this disclosure.

Investigator Zook testified that Officer Jovanovic was not honest with her during the initial stages of the interview, but eventually he revealed that he had given

Patrolman Casey the information. Investigator Zook testified that she felt that he had given him false information and that he violated the confidentiality rules which applied to correction officers. Most of her testimony focused on Officer Jovanovic's dishonesty in the initial interview. On cross-examination, Investigator Zook conceded that there had been violence in the jail. She also testified that she never looked for the letter which Officer Jovanovic claimed to have seen.

**Investigator Kevin Koch**, a Senior Investigator for NJDOC, testified that he was present for the videotaped interview of Officer Jovanovic on February 20, 2014. He believed that Officer Jovanovic was not truthful regarding giving the information to Patrolman Casey. Although Officer Jovanovic ultimately admitted giving the information to Patrolman Casey, Investigator Koch was concerned with the initial lack of honesty and cooperation by Officer Jovanovic.

**Lieutenant Mervin Ganesh** is an Administrative Lieutenant at the State Prison, and has been employed as a correction officer for the NJDOC for eighteen years. His current position is to uphold policies and procedures. He is familiar with the charges in this case, but was not the administrative lieutenant at the time they were brought. He testified about the training recruits go through and the one year probationary period. After recruits complete six weeks at the academy, they complete a two week in-service training, and begin a probationary period for one year. There is one evaluation after six months and another after one year. Officer Jovanovic's initial report was satisfactory, and he received a notice that he became a correction officer in March 2014. However, after the investigation, he received a second evaluation, which was noted as "unsatisfactory."

Lieutenant Ganesh identified the rules and policies which were given to officers upon employment at NJDOC. The list, which Officer Jovanovic had acknowledged receipt of, consists of over seventy separate documents. (R-9.) Lieutenant Ganesh identified the policies which the respondent alleges were violated by Officer Jovanovic's communications with Patrolman Casey. Lieutenant Ganesh referenced Rules D and E



in the Handbook of Information of Rules for Employees (R-6.), which provided as follows:

- D. Employees of the Department shall refrain from publicly discussing Department/institution security affairs when off duty.
- E. All information relative to institutional security and individual inmates is confidential and must not be divulged. Employees are prohibited from imparting information to newspaper representatives or representatives of other forms of the media or other persons not officially connected with the institution or the Department of Corrections without prior authorization.

Lieutenant Ganesh also identified Article IX, Section 8 (a) and (b), in the Law Enforcement Personal Rules and Regulations which provided that officers shall:

- a. Not disclose to any person any information received or acquired in the course of and by reason of official duty and not generally available to the public unless specifically authorized by Competent Authority
- b. Treat as confidential, unless the contrary is authorized by Competent Authority, matters or information pertaining to the Department, its operation, investigation or internal procedures.

Lieutenant Ganesh also identified Ethical Rules Supplement 3, which pertained to the dissemination of information for pecuniary gain, and Article II, Section 7, which provides that "No officer shall make or cause to be made, any false or misleading statements," and "No officer shall intentionally omit or misrepresent facts or information know to officers."

Lieutenant Ganesh testified that there was a chain of command which officers are required to go through if there is a threat or an incident in the prison. However, he did not state how Officer Jovanovic's dissemination of this information to Patrolman Casey jeopardized internal security or violated confidentiality. Furthermore, although

Lieutenant Ganesh cited to the rules regarding dissemination to the media and dissemination for pecuniary gain, there is no allegation of any pecuniary gain or a dissemination to the media by Officer Jovanovic in this matter. Lieutenant Ganesh testified regarding the training that recruits went through, but failed to discuss any training relative to the communications at issue.

The remainder of Lieutenant Ganesh's testimony focuses on Officer Jovanovich's initial responses in the video interview. Lieutenant Ganesh viewed the video and testified that his initial responses were not truthful and as such, were in violation of the rules regarding cooperation and honesty in investigations. He stated that these rules were very important in the proper functioning of a correction center. Lieutenant Ganesh testified that although Officer Jovanovic was ultimately truthful, his initial responses were in violation of the rules and policies.

**For appellant:**

**Officer Derek Jovanovic** testified on his own behalf. He was hired in March 2013 as a corrections officer with the NJDOC. Prior to this position, he was employed by the Asbury Park Police Department as a Special Officer, which was not a permanent position. After completing training and a six month probationary period, he received a satisfactory evaluation. Thereafter, in March 2014, he received notice that he had become a State Correction Officer. He testified that shortly after this notice, this investigation commenced and he was given an "unsatisfactory" evaluation. He was then served with notice of the pending charges.

Officer Jovanovic testified that in early February 2014, he was working on the 7 wing and he heard the code with respect to a fight that broke out in the mess hall. He testified that he heard a second code, heard officers screaming and smelled pepper spray. He testified that he spoke to officers involved and was told it was a full blown riot. He also stated that some officers were injured and that several were disciplined as a result of the mess hall incident. Officer Jovanovic testified that he was aware of the

incident involving Officer Then, a female officer who was severely beaten by an inmate in early February. He testified that right around that time period an officer showed him a letter that he had found in an inmate's cell regarding the targeting of female correction and police officers. The letter stated that the gangs should show law enforcement who is in charge by shooting at female officers.

Officer Jovanovic testified that everything that he told Patrolman Casey was true and he thought he was doing the right thing to protect his fellow officers in law enforcement. He was not aware that Patrolman Casey was going to prepare a memo for distribution and/or use his name. He thought "he was just having a conversation with a friend." Officer Jovanovic testified that he was unaware that he was violating any policy or rules by sharing this information with Patrolman Casey.

Officer Jovanovic testified that on February 20, 2014, he was told to immediately report to the Special Investigation Division (SID) for questioning. He testified that he had no idea what it was about, but he was advised to bring a union representative with him. He testified that he was very nervous and when Investigator Zook mentioned possible criminal charges, he became more reluctant to say anything. He testified that Investigators Zook and Koch were very intimidating and aggressive in their questioning and he was scared. After taking a short break in the interview to talk to his union representative, Officer Jovanovic came back into the interview and advised investigators Zook and Koch that he told Patrolman Casey about the violence in the prison and the letter that was found in an inmate's cell. Officer Jovanovic testified that he truly regretted that he was not forthcoming and honest from the start of the interview.

### **FINDINGS OF FACT**

The resolution of the charges against Officer Jovanovic requires that I make a credibility determination regarding the critical facts. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of fact. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must

not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experiences and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718,749 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth. In re Perrone, 5 N.J. 514. 521-22 (1950). See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses, it is my view that Officer Jovanovic was honest and sincere in his testimony. It is undisputed that there were a series of events that occurred at the State Prison around this time, and further, that Officer Jovanovic related these events to a former colleague on the police force in Asbury Park. I find that the information that he shared with Casey was true to the best of his knowledge. With the exception of the letter, which the NJDOC denies having located or even looked for, all of the information that Officer Jovanovic shared with Patrolman Casey was accurate and confirmed by the NJDOC witnesses. I find that the rules regarding dissemination of information relating to prison security were not violated by the statements made to Patrolman Casey, nor did these statements compromise the internal security of the prison. Finally, I find that Officer Jovanovic did not provide any information to the media, nor did he obtain any pecuniary gain for these communications. The communications were made to another law enforcement officer who also had a sworn duty to protect the public.

With respect to the conduct of Officer Jovanovic in the interview with investigators Zook and Koch, I find the rules regarding "Falsification: Intentional Misstatement of Material Facts in Connection with an Investigation and Truthfulness"

were violated. It is undisputed that Officer Jovanovic was initially untruthful when questioned about his communications to Patrolman Casey. However, before the conclusion of the interview, and after given an opportunity to discuss the matter with his union representative, Officer Jovanovic revealed that he had not been honest initially and advised them that he did tell Patrolman Casey about the letter and the violence in the Prison. I find that his testimony that he regretted his initial lack of candor was sincere and credible. It was also quite clear in the video that he was scared and the interrogation techniques were overly aggressive.

Accordingly, I FIND:

1. On or about February 16, 2014, Officer Jovanovic communicated to Patrolman Michael Casey of the Asbury Park Police Department that there was a riot in the prison mess hall and there was a note found in an inmate's cell indicating that female officers were being targeted by gang members.
2. The statements made by Officer Jovanovic were true to the best of his knowledge and belief. Such disclosures did not compromise the security of the jail, compromise the confidentiality of the inmates, or violate the rules and regulations regarding dissemination of information to the public.
3. Officer Jovanovic was initially not truthful with Investigators regarding his communications with Patrolman Casey, but ultimately, before the conclusion of the interrogation was truthful about his communications with Patrolman Casey. However, I find that his initial lack of candor to the investigators was in violation of the rules and regulations regarding truthfulness and cooperation in investigations.

## LEGAL DISCUSSION AND CONCLUSION

The Civil service employee's rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12.6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointment and broad tenure protection. See Essex Council Number 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1971); Mastrobattista v. Essex County Park Commission, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this State is to provide public officials with appropriate appointment, supervisory and other personnel authority in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). A public employee who is thus protected by the provision of the Civil Service Act may nonetheless be subject to major discipline for a wide variety of offenses connected to his or her employments. The general causes for such discipline are enumerated in N.J.A.C. 4a:2-2.3

"The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We can take judicial notice that such facilities, if not purely operational have a capacity to become tinderboxes." Bowden, supra. 268 N.J. Super. at 306. Because correction officers, like police are part of a quasi-military organization, they are held to the higher standard. A correction officer represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public. *Ibid.*

In an appeal concerning major disciplinary action, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.S.A. 11:2-21; N.J.A.C. 4A:2-14 (a). This applies to both permanent career service employees or those in their working test period relative to such issues as removal, suspension, or fine and disciplinary demotion. N.J.S.A. 11A:2-14; N.J.S.A. 11A:2-6. The State has the burden to establish by a preponderance of the competent, relevant and credible

evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk Licence Revocation, 90 N.J. 550 (1980).

This matter involves a major disciplinary action brought by the respondent appointing authority against appellant seeking his removal. Specifically, Officer Jovanovic has been charged with violating the following offenses:

- C-8 Falsification: Intentional Misstatement of Material Fact in Connection with Work, Employment, Application, Attendance, or in any Record, Report, Investigation or Other Proceeding;
- C-11 Conduct Unbecoming an Employee;
- C.10 Divulging Confidential Information Without Proper Authority;
- 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.

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)).

Based upon the testimony and findings, I **CONCLUDE** that the respondent has not satisfied its burden of proving that appellant divulged confidential information without proper authority, violated the policy prohibiting disclosure of confidential information or information involving safety and security in the prison, or violated any administrative procedures and/or regulations involving safety and security or any rules, regulation, policy, procedure, order or administrative decision. I further **CONCLUDE** that the respondent has satisfied its burden of proving that appellant was in violation of rules regarding Falsification; Intentional misstatement of material fact in connection with work, employment, application, attendance or in any record report, investigation or other proceeding by the initial misstatements made in connection with the investigation. However, I further **CONCLUDE** that there were mitigating factors and appellant was truthful by the conclusion of the interview.

The issue then becomes, not whether certain charges have been sustained, as appellant acknowledges his initial lack of candor with the investigation, but rather, the level of discipline to be imposed. The department urges removal and the appellant urges that some level of discipline less than removal is appropriate given the circumstances presented here.

### **PENALTY**

Once a determination is made that an employee has violated a statute, regulation or rule concerning his employment, the concept of progressive discipline must be considered. When dealing with the question of penalty in a de novo review of a disciplinary action against a civil service employee, the Merit System Board (i.e. now the Civil Service Commission) is required to evaluate the proofs and penalty on appeal, based on the charges. N.J.S.A. 11A:2-19; West New York v. Bock, 38 N.J. 500 (1962). With respect to the discipline, under the precedent established by Town of West New York v. Bock, supra, courts have stated, "[a]lthough we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, Id. at 523, that past record may be considered when determining the appropriate



penalty for the current offense.” In re Phillips, 117 N.J. 567, 581 (1990). Ultimately, however, “it is the appraisal of the seriousness of the offense which lies at the heart of the matter.” Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

Appellant’s disciplinary history, albeit short, reveals two satisfactory evaluations and no other discipline. In determining the appropriate penalty to be imposed here, all aggravating and mitigating factors must be considered. The mitigating factors in this case are the appellant has no prior disciplinary history and all witnesses testified that he was a “good officer.” The other mitigating factor is that the appellant was unaware that he was violating any rules in his communications with Patrolman Casey, and in fact, I have found that the charges with respect to such violations have not been sustained. With respect to his initial untruthfulness and lack of candor with the investigators, I find the aggressive nature of the interview and the threat of criminal charges made against Officer Jovanovic are mitigating factors. Accordingly, I **CONCLUDE** that an appropriate penalty for this violation is a ninety day suspension.

### **ORDER**

The charge of C-8 – Falsification; intentional misstatement of material fact in connection with work is sustained. The remaining charges C-11 – Conduct Unbecoming an Employee; C.10 – Divulging Confidential Information Without Proper Authority; 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 are not sustained and are hereby dismissed. I **ORDER** that a penalty of ninety days be imposed. Therefore, I **ORDER** the action taken by the Department in removing appellant from his position as a state correction officer is **MODIFIED**. The appellant shall serve as penalty a ninety day suspension.

Since the penalty has been modified, I **ORDER** that appellant is entitled to back pay, benefits, and seniority pursuant to N.J.A.C. 4A:2-2.10. The amount of back pay


awarded is to be reduced and mitigated for that period of time when back pay was waived. However, the appellant is not entitled to counsel fees. Pursuant to N.J.A.C. 4A:2-2.12(a), the award of counsel fees is appropriate 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, September 21, 1989). In the case at hand, while the penalty was modified and one of the charges was dismissed, the Commission has sustained the remaining charges and imposed major discipline. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. See In the Matter of Bazyt Bergus (MSB, decided December 19, 2000), aff'd, 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 Mario Simmons (MSB, 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).

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.

December 1, 2014  
DATE

  
SARAH G. CROWLEY, ALJ

Date Received at Agency:

December 1, 2014

Date Mailed to Parties:

December 1, 2014

SGC/cb

**APPENDIX**

**WITNESSES**

**For appellant:**

Derek Jovanovic

**For respondent:**

Patrolman Michael Casey

Investigator Nancy Zook

Investigator Kevin Koch

Lieutenant Mervin Ganesh

**EXHIBITS**

**Joint Exhibits:**

J-1 Preliminary Notice of Disciplinary Action, dated April 2, 2014

J-2 Final Notice of Disciplinary Action, dated June 4, 2014

J-3 DOC Human Resources Bulletin 84-17

**For appellant:**

None

**For respondent:**

R-1 Asbury Park Police Department memo, dated February 16, 2014

R-2 Disc of SID Interview of Michael Casey, dated March 3, 2014

R-3 Investigation Report from Nancy Zook, dated March 31, 2014

R-4 Disc of SID Interview of Derek Jovanovic, dated February 20, 2014

R-5 Probationary Report, dated March 15, 2014

R-6 NJDOC Handbook of Information and Rules

- R-7 Law Enforcement Personnel Rules and Regulations
- R-8 Office of Human Resources – Internal Management Procedures
- R-9 DOC Office of Human Resources – New-Hire Orientation Checklist