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**STATE OF NEW JERSEY**

In the Matter of Carlos Nieves  
Central Office  
Department of Corrections

CSC DKT. NO. 2013-1819  
OAL DKT. NO. CSV 874-13

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**FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION**

**ISSUED: February 5, 2015 PM**

The appeal of Carlos Nieves, Senior Correction Officer, Central Office, Department of Corrections, 60 working day suspension, on charges, was heard by Administrative Law Judge John S. Kennedy, who rendered his initial decision on December 8, 2014. 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 February 4, 2015, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

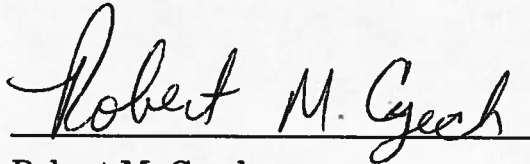
**ORDER**

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified. However, the Commission modifies that action to a twenty-two (22) working day suspension and orders that the appellant be granted back pay, benefits, and seniority for the period of thirty-eight (38) days.

Re: Carlos Nieves

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  
FEBRUARY 4, 2015



Robert M. Czech  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

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

attachment



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

**INITIAL DECISION**

OAL DKT. NO. CSV 874-13

AGENCY DKT. NO. 2013-1819

**IN THE MATTER OF CARLOS  
NIEVES, CENTRAL OFFICE,  
DEPARTMENT OF  
CORRECTIONS.**

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**Christopher A. Gray, Esq.,** for appellant (Sciarra & Catrambone, LLC,  
attorneys)

**Kathleen Asher,** Legal Specialist, for respondent, appearing pursuant to  
N.J.A.C. 1:1-5.4(a)2

Record Closed: October 24, 2014

Decided: December 8, 2014

BEFORE **JOHN S. KENNEDY, ALJ:**

**STATEMENT OF THE CASE**

Respondent, Central Office Department of Corrections (hereinafter Appointing Authority), suspended appellant, Carlos Nieves, for sixty days. The Appointing Authority alleges that appellant, a Senior Correction Officer (hereinafter SCO), plead guilty to a charge of Tampering with Government Records and that suspension for a period of sixty days was the appropriate penalty.

Appellant was charged for this offense with violations of N.J.A.C. 4A:2-2.3(a)(6), Conduct unbecoming a public employee; and N.J.A.C. 4A:2-2.3(a)(12), Other sufficient cause (R-1b). Appellant was also charged with violations of Human Resources Bulletin (HRB) 84-17 (as amended) C-11, Conduct unbecoming an employee, C-8 Falsification and E-1 Violation of Rules and Regulations.

### **PROCEDURAL HISTORY**

On August 7, 2012, and amended on September 11, 2012, the Appointing Authority issued a Preliminary Notice of Disciplinary Action (R-1a) setting forth the charges and specifications made against appellant. After a departmental hearing on December 20, 2012, the Appointing Authority issued a Final Notice of Disciplinary Action (R-1b) on December 28, 2012, sustaining the charges in the Preliminary Notice and suspending appellant from employment for sixty days. Appellant appealed on January 10, 2013, and the matter was filed at the Office of Administrative Law on January 17, 2013, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on October 24, 2014, and at the conclusion of the hearing, the record closed.

### **FACTUAL DISCUSSION**

**Major David Redman** has been employed by the Appointing Authority for approximately twenty-five years. He is currently the Security Major at Bayside Prison and oversees the security of that institution. He has been at Bayside for the past fifteen years. Major Redman was notified by Central Office that appellant was being transferred to Bayside from the Special Operations Group (SOG) due to a disciplinary issue. SOG is a specialized unit within the Department of Corrections (DOC) similar to a S.W.A.T. team. SOG members are subjected to an intense screening process and are typically considered the best of the best officers. They must adhere to certain qualifications that are above standard including physical fitness and they receive specialized training. Once on site, SOG takes over the operation of the facility until the emergency is resolved. They handle high risk transports and emergency situations concerning inmates. Appellant is one of the trainers of the SOG team and has

continued to train the team even after he received the disciplinary charges. Appellant has been working for the DOC since 2001.

Major Redman's first involvement with this case was after the DOC had disciplined the appellant. Major Redman was not involved with the investigation of the charges at issue. According to the discipline packet Major Redman received upon appellant's transfer to Bayside, it became apparent that appellant received a sixty-day suspension because he was charged with the third degree crime of falsification of a firearms application (R-5). On February 29, 2012, appellant completed an application for a firearms purchaser identification card with the Millville Police Department (R-2). The application was denied on July 9, 2012, because appellant failed to disclose his prior criminal record in the application. This was considered by the Millville Police Department to amount to falsification of the Application (R-5, page 1). On July 27, 2012, appellant was criminally charged with knowingly giving false information on the application, a crime of the third degree (R-4). Major Redman testified that this action constituted a violation of the provisions of the Law Enforcement Personnel Rules and Regulations (R-7). In particular, the charge violated Sections 7 and 8 of the Performance of Duties Article and Section 1 of the General Provisions of the Rules and Regulations. Any time a corrections officer is charged with a crime, it is procedure that the officer receives an immediate suspension. As a law enforcement officer, part of the oath of office is to abide by all state and federal laws as well as all rules of conduct of the DOC.

Appellant was charged with violations of the New Jersey Department of Corrections Human Resources Bulletin 84-17, also referred to as the DOC's Disciplinary Action Policy (R-8). C-8 of 84-17 deals with Falsification and defines that term as "intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation or other proceeding" (R-8, page 8). Major Redman agreed that the firearm application was not prepared in connection to appellant's work, employment application or attendance. Appellant appealed the denial of his firearms application and was approved to carry an off duty weapon on September 19, 2014 (P-3).

Major Redman was made aware that appellant plead guilty to a disorderly persons offense as a result of the charges filed against him but that conviction was vacated. He was enrolled into the Pre-Trial Intervention Program (PTI) and the charges were dismissed on July 22, 2014 (P-8). Based upon this, Major Redman agreed that there is no conviction to indicate appellant did not follow the law. Major Redman knew appellant to be honest and was surprised because it is rare that a member of the SOG team would be removed. They are normally selected as a result of their character.

**Carlos Nieves** next testified on his own behalf. He has been employed as a corrections officer with the DOC since 2001. He was at Bayside for about ten years until he was asked to apply for SOG. He was a member of the team for a year until this incident but he still provides the team instruction. He was in the Army as a special operations member.

In 2007, appellant plead guilty to simple assault. At the time of the plea, he was getting ready to deploy and his understanding was that the worst that could happen to him would be to receive probation. His attorney in 2007 never advised him that he could face jail time as a result of his guilty plea. His attorney made arguments against him receiving probation and the judge never discussed that appellant could face jail (P-9).

When he filled out the firearms application he was not intentionally trying cover up the fact that he had a prior conviction on his criminal record. It was not until he received a call from the Millville Police Department several months later that he was made aware that there was a problem with the application. He received a denial letter of his firearms application on July 9, 2012 (R-5). On July 26, 2012, he appealed the decision stating in that appeal that he takes full responsibility for his misunderstanding of the initial application but at no time was it intentional (P-6). The next day, on July 27, 2014, he was charged by the Millville Police Department with knowingly giving false information on the application.

On August 17, 2012, appellant submitted a Special Custody Report to his then supervisor, Major Kyle, advising that he was issued the summons in question. In that

document, appellant stated that it was not his intention to misinform or falsify his information on the application. His interpretation was that the question on the application was to determine if he had ever served jail time due to a conviction. Since he did not serve any jail time for his prior disorderly persons conviction, he thought he answered the question correctly (P-5, page 2). Appellant admitted that he inaccurately answered the question but it was not done so knowingly. On August 16, 2012, he pled guilty to a downgraded charge because he was suspended without pay until the matter was resolved. During his plea he admitted to inaccurately answering the question but not to knowingly doing so. He agreed to this because his wife and family could not afford for him to be out of work for any length of time as he is the sole provider for his family (P-5, page 2). He never admitted during the course of any of these proceedings that he knowingly lied on the application. The question he was charged with falsifying read as follows: "Have you ever been convicted of a disorderly persons offense in New Jersey or any criminal offense in another jurisdiction where you could have been sentenced up to six months in jail that has not been expunged or sealed" (R-2). He read this to require that he had to serve six months or be eligible to receive six months jail as a result of his conviction. He felt that the question was misleading.

The August 16, 2012 conviction was vacated on March 22, 2014 and he was admitted into PTI (P-2). He was not required to admit that he intentionally falsified the firearms application as a condition of entering PTI. On July 22, 2014, he received an order dismissing the charges after he completed PTI (P-8). He has never admitted any intentional false statement on the firearms application at any time. He did not intentionally seek to deceive the police or cover up his 2007 conviction when he filled out the firearms application. At the time he filled out the firearms application, appellant asked a member of the Millville Police Department if he needed to list a disorderly persons conviction and she said no. He reported this to the officer that investigated the charges on behalf of Millville (R-5, page 3). This is the first time he has ever received disciplinary charges from the DOC.

## FINDINGS OF FACT

The record in this matter includes documentary evidence and the testimony of the individuals who prepared the documents or had knowledge of the incidents they described. Major Redman testified in a credible manner. He provided direct and intelligent answers and provided clear insight to DOC procedures and requirements. He was not involved in the investigation of the charges and knew appellant to be honest. He had no knowledge of whether the appellant intentionally made false statements on the firearms application.

When assessing credibility, inferences may be drawn concerning the witness' expression, tone of voice and demeanor. MacDonald v. Hudson Bus Transportation Co., 100 N.J. Super. 103 (App. Div. 1968). Additionally, the witness' interest in the outcome, motive or bias should be considered. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

I **FIND** appellant to be a credible witness and his testimony believable. He testified that he never admitted any intentional false statement on the firearms application at any time. He did not intentionally seek to deceive the police or cover up his 2007 conviction when he filled out the firearms application. There would be no reason for appellant to purposely not disclose the 2007 conviction particularly when he was advised by an employee of the Millville Police Department that he did not need to list the conviction on the firearms application. As a result, I **FIND** as **FACT** that appellant did not intentionally make a false statement on the firearms application.



After carefully reviewing the videotape, exhibits and documentary evidence presented numerous times both during the hearing and after, and after having had the opportunity to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following to be the additional relevant and credible **FACTS** in this matter: On February 29, 2012, appellant completed an application for firearms purchaser identification card with the Millville Police Department (R-2). The application was denied on July 9, 2012 because appellant failed to disclose his prior criminal record in the application. This was considered by the Millville Police Department to amount to falsification of the Application (R-5, page 1). On July 27, 2012, appellant was criminally charged with knowingly giving false information on the application, a crime of the third degree (R-4). On August 16, 2012, he pled guilty to a downgraded charge. Appellant was suspended from the date the charges were filed until the day after he pled guilty totaling twenty-two days. The August 16, 2012 conviction was vacated on March 22, 2014, and appellant was admitted into PTI (P-2). On July 22, 2014, he received an order dismissing the charges after he completed PTI (P-8). Appellant appealed the denial of his firearms application and was approved to carry an off duty weapon on September 19, 2014 (P-3).

### **LEGAL ANALYSIS AND CONCLUSIONS**

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The Appointing Authority shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling

Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Appellant was charged with "Conduct unbecoming a public employee," N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Appellant's status as a senior correction officer subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). They represent "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." Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

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 properly operated, have a capacity to become "tinderboxes."

[Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).]

I **CONCLUDE** that appellant's behavior did not rise to a level of conduct unbecoming a public employee even when the aforementioned higher standard is applied. The basis for the charge of conduct unbecoming was Appellant's guilty plea on August 16, 2014. He took steps over the course of two years to have that conviction vacated and the charges were ultimately dismissed. The fact that Appellant appealed the denial of his firearms application and later received a permit to carry an off duty weapon further supports this conclusion. Appellant's conduct was not such that it could adversely affect the morale or efficiency of a governmental unit or destroy public respect in the delivery of governmental services.

Appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Appellant's conduct was not such that he violated this standard of good behavior. As such, I **CONCLUDE** that appellant's actions does not fit this charge.

As to the charge of violation of section C-8, "Falsification," the HRB at Page 8 defines Falsification as:

. . . Intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation or other proceeding.

The actions of appellant do not fit directly within the definition of falsification as set forth in the HRB. There has been no evidence presented that appellant intentionally misstated any facts. Furthermore, the misstatement of fact was not made in connection with appellant's work, employment application or attendance. Appellant testified that he inaccurately answered the question on the firearms application but it was not done so

knowingly. He did not intentionally seek to deceive the police or cover up his 2007 conviction when he filled out the firearms application. Therefore, I **CONCLUDE** that the Appointing Authority has not met its burden of proof that appellant committed an act of Falsification pursuant to HRB section C-8.

As to the charge of "Violation of a policy" under section E-1 of the HRB, I **CONCLUDE** that the Appointing Authority has proven that appellant did violate the provisions of the Law Enforcement Personnel Rules and Regulations (R-7). In particular, the charge violated Section 7 of the Performance of Duties Article. Section 7 states that "No officer shall make, or cause to be made, any false or misleading statements" (R-7, page 6). It is clear that appellant failed to disclose his prior criminal record on the firearms application he submitted to the Millville Police Department on February 29, 2012. This section of the Law Enforcement Personnel Rules and Regulations does not require that false statement be made either intentionally or knowingly. Therefore, appellant did commit a policy violation. I **CONCLUDE** that the Appointing Authority has met its burden of proof on this issue.

### **PENALTY**

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

Appellant has previously served twenty-two days of the sixty-day suspension for his actions relating to these charges. Appellant has no prior disciplinary action on his record other than an official reprimand for excessive absenteeism in 2004 (R-9).

For his actions arising out of this incident, appellant has been found to have violated Section E-1 of the HRB, "violation of a policy." The HRB calls for a range of discipline for a first infraction of this section of official written reprimand to removal. There is discretion allowed in the document for the aforementioned charges. Concepts of progressive discipline or discussions of a range of disciplines can be considered.

I am not satisfied that appellant's actions herein were egregious. The incident began over appellant's failure to disclose his prior criminal record on a firearms application. This was not done intentionally but rather based on appellant's misunderstanding of the question. Appellant lacks any prior discipline of significance and he has a history of only minor discipline for absenteeism issues. After having considered all of the proofs offered in this matter, and the impact upon the institution regarding the behavior by appellant herein, and after having given due deference to the impact of and the role to be considered by and relative to progressive discipline, I **CONCLUDE** that appellant's policy violation is significant enough to warrant a penalty, which, in part, is meant to impress upon him, as well as others, the seriousness of any further infractions by him in that regard. Therefore, I **CONCLUDE** that the imposition of a 22-calendar day suspension is appropriate.

#### **DISPOSITION**

I **CONCLUDE** that the Appointing Authority has sustained its burden of proof as to the charge of violation of a rule, regulation, policy, procedure or administrative decision. The Appointing Authority has failed to sustain its burden of proof as to the charges of conduct unbecoming a public employee; Other sufficient; and Falsification.

Accordingly, I **ORDER** that the action of the Appointing Authority is **MODIFIED**. Appellant will receive a 22-calendar day suspension.

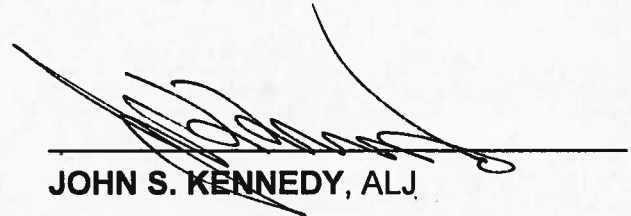
Since the penalty has been modified and appellant has already served 22 days suspension prior to this proceeding, I **ORDER** that appellant is not entitled to back pay, benefits, and seniority pursuant to N.J.A.C. 4A:2-2.10. The appellant is not entitled to counsel fees. Pursuant to N.J.A.C. 4A:2-2.12(a), 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 some of the charges were dismissed, the Commission has sustained the remaining charge 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 fifteen-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 8, 2014  
DATE

  
\_\_\_\_\_  
JOHN S. KENNEDY, ALJ

Date Received at Agency:

December 8, 2014

Date Mailed to Parties:

December 9, 2014

cmo

**APPENDIX**  
**LIST OF WITNESSES**

**For Appellant:**

Carlos Nieves

**For Respondent:**

Major David Redman

**LIST OF EXHIBITS**

**For Appellant:**

- P-1 Certificate of Discharge from Active Duty
- P-2 Order vacating 8/16/12 plea
- P-3 Correspondence approving Firearms Application
- P-4 DOC request of Appellant to serve as instructor in 8/2013
- P-5 Special Custody Reports
- P-6 Appeal of Firearms Application Denial
- P-7 Letters referenced as attachments to Exhibit P-5
- P-8 PTI order of Dismissal
- P-9 Video of 10/25/07 sentencing

**For Respondent:**

- R-1a Preliminary Notice of Disciplinary Action, dated 8/7/12
- R-1b Final Notice of Disciplinary Action, dated 12/28/12
- R-2 2/29/12 Application for Firearms Purchaser Identification Card
- R-3 Transcript of 8/16/12 plea
- R-4 Complaint filed against Appellant dated 7/27/12
- R-5 7/9/12 reason for Disapproval of Firearms Application



- R-6 Special Custody Report
- R-7 Law Enforcement Personnel Rules and Regulations
- R-8 New Jersey Department of Corrections Human Resources Bulletin 84-17
- R-9 Disciplinary History of Appellant