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STATE OF NEW JERSEY

In the Matters of Shanika McNair, Department of Corrections

CSC Docket No. 2014-3069

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

Request for Reconsideration

ISSUED: MAR 0 9 2015 (JET)

Shanika McNair, a former Correction Officer Recruit with Northern State Prison, Department of Corrections, requests reconsideration of the attached final administrative decision, *In the Matter of Shanika McNair, Department of Corrections* (CSC, decided April 9, 2014) which upheld her removal.

By way of background, McNair was removed effective May 28, 2013 on charges of conduct unbecoming an employee, inability to perform duties, falsification, intentional misstatement of material fact in connection with work, employment, application, attendance, or in any record, report, investigation, or proceeding, improper or unauthorized contact with inmates, undue familiarity with inmates, parolees, their families, or friends, violation of rule, regulation, policy, procedure, order or administrative decision, and other sufficient cause. Specifically, the appointing authority alleged that McNair had a previous relationship with an inmate that was not reported and she did not report that the inmate asked her to bring a cell phone into the prison for him. Upon McNair's appeal, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case. The ALJ sustained the charges, but recommended that the removal be modified to a 120 working day suspension. Upon its *de novo* review, the Civil Service Commission (Commission) agreed with the ALJ's findings but did not adopt the recommendation to modify the removal to a 120 working day suspension. Rather, the Commission upheld the removal.

On reconsideration, McNair argues that she never had a prior relationship with the inmate, but rather, states that the inmate was an "associate." She claims that there was no evidence in the inmate's property linking her to a relationship with him prior to her become a Correction Officer Recruit. McNair also argues that she did not receive an Orientation Receipt Form prior to starting the academy and, contrary to the testimony of Correction Sergeant Guy Cirillo, she was not given a week to take the form home to review it. Thus, she maintains that had she been given an appropriate amount of time to review the form, she would have thoroughly completed it and she would have included information on it about the inmate. McNair now acknowledges her poor judgment for not reporting the inmate. However, she believes her actions were appropriate in order to protect her family from retaliation by the inmate. Nevertheless, she maintains that there have been other instances where employees have jeopardized the safety and security of the prison but have been given a second chance. Moreover, McNair asserts that she was serving in a working test period at the time of the incident which should have allowed her another opportunity to correct her mistakes and continue serving in her position.

In response, the appointing authority, represented by Adam Verone, Deputy Attorney General, maintains that McNair did not disclose her relationship with the inmate or that he requested that she bring him a cell phone in the facility. Further, McNair admitted after she began training that she knew the inmate and agency records confirm that she completed several telephone calls to him in the facility. The appointing authority contends that McNair cannot now dismiss her relationship with the inmate as so inconsequential that she had forgotten about it. In addition, McNair had sufficient time to properly complete the background forms and disclose the inmate's name before she began training. The appointing authority adds that McNair's failure to report the information shows that she is not fit to be a Correction Officer. In this regard, the appointing authority explains that the Correction Officer Recruit position is inherently dangerous and it is no excuse that she may have feared retaliation from the inmate. Moreover, McNair has not provided any evidence that would somehow change the outcome of the case or information to show that a clear material error occurred in the Commission's prior decision.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which the Commission (Commission) may reconsider a prior decision. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

In the present matter, McNair has not met the standard for reconsideration. Notwithstanding her assertion that the inmate was an associate and she was not in a relationship with him, McNair admittedly failed to report the prior association with the inmate. Moreover, the time she had to complete the orientation form is irrelevant, as not only is the form self-explanatory, the ALJ found that the evidence indicated that at the time she filled out the form, McNair was aware of her associate's incarceration. Further, while she claims that she did not initially report the inmate's request for a cell phone because she had learned that he was a gang member and was in fear for herself and her family, this does not minimize the fact that her failure to report the request clearly created a security risk for the prison. Additionally, as noted in the prior decision, an immature decision does not obviate the severity of her actions and such bad judgment is unacceptable for an employee serving as a Correction Officer.

Regarding her argument that she should be restored to employment because she was serving in a working test period and should be afforded an opportunity to correct her mistakes, McNair's offenses in this matter were so egregious that the penalty of removal was warranted. In this regard, the Commission has previously determined that disciplinary actions are a valid basis to release an employee. *See In the Matter of Walter F. Kowalczyk* (MSB, decided September 6, 2006) (Disciplinary action during a working test period, especially relating to performance, could form a sufficient justification to release an employee). Therefore, while McNair argues that the Commission erred by upholding her removal, she has not presented any specific evidence in her request for reconsideration which would somehow change the outcome of the prior matter.

ORDER

Therefore, it is ordered that this request for reconsideration be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4th DAY OF MARCH, 2015

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries and Correspondence

Henry Maurer
Director
Division of Appeals & Regulatory Affairs
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Attachment

c: Shanika McNair
Adam Verone, DAG
James Mulholland
Kenneth Connolly
Joseph Gambino

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STATE OF NEW JERSEY

In the Matter of Shanika McNair

CSC Docket No. 2014-6
OAL Docket No. CSV 09600-13

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APR 24 2014 (JET)

The appeal of Shanika McNair, a Correction Officer Recruit with Northern State Prison (NSP), Department of Corrections, of her removal effective May 28, 2013, on charges, was heard by Administrative Law Judge Leland S. McGee (ALJ), who rendered his initial decision on February 24, 2014. Exceptions were filed on behalf of the appointing authority and cross exceptions were filed on behalf of the appellant.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on April 9, 2014, accepted and adopted the Findings of Fact as contained in the initial decision, but did not adopt the ALJ's recommendation to modify the removal to a 120 working day suspension. Rather, the Commission upheld the removal.

DISCUSSION

The appellant was charged with conduct unbecoming an employee, inability to perform duties, falsification, intentional misstatement of material fact in connection with work, employment, application, attendance, or in any record, report, investigation or proceeding, improper or unauthorized contact with inmates, undue familiarity with inmates, parolees, their families, or friends, violation of rule, regulation, policy, procedure, order or administrative decision, and other sufficient cause. Specifically, the appointing authority alleged that the appellant had a previous relationship with an inmate that was not reported while at the

Department of Corrections Training Academy. The appointing authority also asserted that the appellant did not report when the inmate asked her to bring a cell phone into the prison for him. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case.

In his initial decision, the ALJ found that the appellant graduated from the Department of Corrections Training Academy on March 26, 2013 and she began her assignment at NSP on March 27, 2013. Further, the ALJ found that the Special Investigation Division (SID) received information indicating that the appellant had a prior relationship with inmate A.Y. who was incarcerated at NSP. SID subsequently conducted an investigation and the appellant admitted to SID during an interview that she engaged in a brief relationship with inmate A.Y. prior to her appointment at NSP. The appellant also admitted that she failed to report the relationship when she became aware of A.Y.'s incarceration at NSP and she did not admit the relationship during her orientation at the Correction Officer Training Academy. The appellant admitted that A.Y. had intimate knowledge of her home life and he knew some of her family members.[1] The appellant stated that she did not report the relationship because she forgot about it and she stopped talking to A.Y. in November 2011. The ALJ indicated that A.Y. approached the appellant on April 12, 2013 and he requested to have maintenance fix the light in his cell. The appellant stated that she did not immediately recognize A.Y. until he approached her and she did not report that incident because he knew where her family lived and she was afraid. A.Y. also approached her on April 21, 2013 and he asked her to bring him a cell phone. The ALJ found that the appellant denied his request and she reported her contact with A.Y. the next day. However, she did not report that A.Y. requested that she provide him with a cell phone. The ALJ also indicated that A.Y. listed the appellant on the visitor's list for the Union County Correctional Center. However, there was no record that the appellant visited A.Y. at that facility.

The ALJ concluded that the appellant should have immediately reported her contacts at NSP with A.Y. The ALJ further concluded that it was clear that the appellant failed to complete her duty of reporting a relationship with an inmate during her orientation. She also failed to fully disclose the substance of her contacts with A.Y. at NSP. Further, the appellant was aware of A.Y.'s incarceration at the time of her employment. Thus, the ALJ concluded that the failure to report that information during the orientation and her employment was a violation of rules and regulations. Moreover, the ALJ concluded that the appellant violated procedure and failed to perform her duties when she did not disclose that A.Y. committed a criminal act by requesting that she bring him a cell phone

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[1] The appellant also admitted that she exchanged numerous text messages and spoke with A.Y. on the cell phone on numerous occasions before his incarceration, and she admitted to writing to him while he was incarcerated. She also met with him on several occasions prior to his incarceration at various locations, including her home.

As to the penalty, the ALJ dismissed the charges of inability to perform duties and other sufficient cause. The ALJ sustained the charges of conduct unbecoming an employee; intentional misstatement of material fact; undue familiarity with inmates; and violation of rules, regulations, policies and procedures. The ALJ noted that the appellant had no prior disciplinary history and she had not completed a full month of employment. The ALJ also indicated that the appellant made an ill-advised, naïve and immature decision and the appropriate penalty in this matter was a 120 working day suspension.

In its exceptions, the appointing authority argues that the evidence clearly shows that the appellant knowingly compromised her position when she failed to timely report her prior relationship with A.Y. at the time of her appointment as a Correction Officer Recruit. She also failed to report that A.Y. identified himself to her on April 12, 2013. The appointing authority adds that the inmate also asked the appellant to provide him with a cell phone, which is contraband. Further, the appointing authority states that the appellant's relationship endangered the safety of inmates, correction officers, and the public. The appointing authority adds that the appellant's behavior blatantly violated the appointing authority's policies and procedures when she failed to report her prior relationship and contacts with A.Y. In this regard, the appellant clearly indicated on her orientation form that she did not have a relationship with anyone presently incarcerated. The appellant failed to report her relationship with A.Y. until she was interviewed by the SID and she omitted several material facts about her encounter with A.Y. The appellant also failed to charge A.Y. for attempting to obtain contraband, namely, a cell phone. Moreover, the appellant's failure to report her prior relationship and contacts with A.Y. clearly shows that she cannot adequately perform her duties. Thus, it contends that the appellant's misconduct is clearly egregious and warrants her removal.

In response, the appellant argues that the ALJ was correct and the recommendation should be upheld. In this regard, the ALJ carefully considered the evidence and modified the removal to a 120 working day suspension.

After a thorough and independent review of the entire record, including the exceptions filed by the appointing authority and cross exceptions filed by the appellant, the Commission does not agree with the ALJ's determination to modify the removal to a 120 working day suspension. Rather, for the reasons discussed below, the Commission upholds the removal.

As to the charges, the Commission agrees with the ALJ the charges of conduct unbecoming an employee; intentional misstatement of material fact; undue familiarity with inmates; and violation of rules, regulations policies and procedures should be sustained. The appellant's failure to report the prior relationship with A.Y., her contacts with A.Y. at the prison, and A.Y.'s request for a cell phone, clearly

created a security risk to the prison. The appellant's actions adversely affected the efficiency of work operations and public respect for public employees and confidence in public services. Moreover, the ALJ's finding that the appellant made an immature decision is not persuasive given that the appellant was well aware that A.Y. was incarcerated at the time of her training.

In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. Moreover, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the principle of progressive discipline is not "a fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007). A review of the appellant's personnel record evidences that she does not have any prior disciplinary history. However, the appellant did not complete a full month of employment as a Correction Officer Recruit.

In the instant matter, the appellant's failure to report the prior relationship with A.Y., her contacts with him in the prison, and his request for a cell phone, was utterly inappropriate. This conduct caused a security risk to the prison which cannot be ignored. The matter is compounded by the fact that the appellant was well aware that A.Y. was incarcerated when she began her training as a Correction Officer Recruit. Although the ALJ found that the appellant made an immature decision, this does not obviate the severity of her inactions. The appellant was instructed to report any prior relationships with inmates and she failed to report her prior relationship with A.Y. at orientation. Moreover, the appellant omitted information regarding A.Y.'s illegal request for a cell phone when she submitted the April 21, 2013 report. Such behavior is unacceptable for an employee serving as a Correction Officer. The Commission is mindful that a Correction Officer is a special kind of public employee. Correction Officers are law enforcement officers who hold highly visible and sensitive positions within the community and the standard for such an employee includes good character and an image of utmost confidence and trust. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied*, 47 *N.J.* 80 (1966). *See also, In re Phillips*, 117 *N.J.* 567 (1990). Moreover, the Commission is also mindful that:

> The appraisal of the seriousness of [the appellant's] offenses and degree which such offenses subvert discipline ... are matters peculiarly within the expertise of the corrections officials. The appraisal is subject to *de novo* review by the Merit System Board [now Civil Service Commission], ... but that appraisal should be given significant weight. *Bowden v. Bayside State Prison,* 268 *N.J. Super.* 301, 306 (App. Div. 1993), *cert. denied,* 135 *N.J.* 469 (1994).

Therefore, the appellant's offense in this case is sufficiently egregious and warrants her removal.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. Therefore, the Commission affirms that action and dismisses the appellant's appeal.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 9th DAY OF APRIL, 2014

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries and Correspondence

Henry Maurer
Director
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 09600-13
AGENCY REF. NO. CSC 2014-6

IN THE MATTER OF SHANIKA MCNAIR,
NORTHERN STATE PRISON,
DEPARTMENT OF CORRECTIONS.

Michael Handwerker, Esq., for petitioner (Goldstein & Handwerker, attorneys)

Adam Verone, DAG, for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: November 25, 2013 Decided: February 24, 2014

BEFORE **LELAND S. MCGEE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Northern State Prison (NSP), Department of Corrections (DOC), respondent, brings a major disciplinary action against Shanika McNair, petitioner. Petitioner appeals the substantiated charges and termination by respondent. Respondent alleges that petitioner violated the Department of Corrections Human Resources Bulletin 84-17 As

Amended, Department of Corrections Law Enforcement Rules and Regulations, and N.J.A.C. 4A:2-2.3(a)(12).

On May 1, 2013, respondent served petitioner with a Preliminary Notice of Disciplinary Action (PNDA) that noted the possible disciplinary action of removal. Petitioner requested an internal disciplinary hearing, which commenced on May 23, 2013. On June 6, 2013, a Final Notice of Disciplinary Action (FNDA) dated May 28, 2013, was personally served on petitioner. The FNDA sustained the charges of inability to perform duties; conduct unbecoming a public employee; C.S. falsification; intentional misstatement of material fact in connection with work, employment application, attendance or in any record, report investigation or proceeding; improper or unauthorized contact with inmates, undue familiarity with inmates, parolees, their families, or frieds; violation of a rule, regulation, policy, procedure, order or administrative decision; and other sufficient cause as set forth in the Preliminary Notice. Petitioner's removal was upheld. Petitioner requested an appeal on June 25, 2013, within twenty days of receiving the FNDA.

On July 5, 2013, the New Jersey Civil Service Commission, Division of Merit System practices and Labor Relations, transmitted the within matter to the Office of Administrative Law (OAL), for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to B-15 and N.J.S.A. 52:14F-1 to F-13. On August 27, 2013, a prehearing conference was held and a prehearing order was issued by the undersigned. Hearings in this matter were scheduled for and held on October 24, and 31, 2013. Petitioner's and respondent's post-hearing briefs were received at OAL on November 25, 2013, and the record closed. An extension was requested and received for the issuing of an Initial Decision because of a voluminous caseload.

FACTUAL DISCUSSION

I **FIND** the following undisputed **FACTS**:

On March 26, 2013, petitioner graduated from the New Jersey Department of

Corrections Training Academy. On March 27, 2013, she began her assignment at Northern State Prison as a correction officer recruit (COR).

Principal Investigator Manuel Alfonso (Alfonso) testified on behalf of respondent. He identified a Special Custody Report (SCR) submitted by petitioner. (R-2.) Alfonso testified that on April 23, 2013, the Special Investigations Division (SID) received a request from Administrator Paul Lagana to investigate information contained in the SCR. In the report, petitioner admitted that she had a "brief" relationship with inmate A.Y. prior to her employment with NSP and prior to his incarceration. (R-2.) She noted that A.Y. has "intimate knowledge of my home life and some of my family members." (Ibid.)

Alfonso testified that SID searched inmate A.Y.'s cell for any evidence pertaining to a relationship with petitioner, to no avail. SID also reviewed inmate A.Y.'s visit list to determine whether petitioner appeared on it, and she did not.

Alfonso testified that on April 26, 2013, SID conducted a videotaped interview of petitioner in the presence of her union representative, Kenneth Little. (R-5.) The video was played during the hearing and viewed by the undersigned. SID presented petitioner with a Weingarten Administrative Rights Form and advised her that she was the subject of an investigation into her relationship with A.Y. (R-4.)

During the interview, petitioner confirmed that she wrote the April 22, 2013, SCR indicating that she had a "brief" relationship with A.Y. prior to her employment with NSP and prior to his incarceration. (R-5.) Petitioner stated that she met A.Y. as a freshman in college when he pulled up next to her car and asked for her phone number; she complied. (Ibid.) Petitioner met him soon after on South Orange Avenue in Newark. (Ibid.) She admitted to giving A.Y. her address and stated that it was "maybe weeks later" that A.Y. came over to her home. (Ibid.) She and A.Y. had numerous telephone and text message exchanges thereafter.

During the interview, petitioner stated that she did not remember how she

became aware that A.Y. was incarcerated. (Ibid.) She admitted to writing to him while he was incarcerated and sent him two pictures of her. She spoke with him on a cellular telephone but did not recall how many times. (Ibid.) Petitioner stated that she stopped talking with A.Y. in on or about November 2011, before she started the DOC hiring process. (Ibid.) Petitioner stated that "he was out of my life at that time" and she didn't remember him when she completed the orientation receipt form.

Alfonso testified that while at the Correctional Staff Training Academy (CSTA), on December 3, 2012, petitioner initialed and signed an orientation receipt form along with the CSTA Rules and Regulations. (R-3.) During her SID interview, Alfonso questioned petitioner about her failure to report her relationship with A.Y. on the orientation receipt form. Her response was that she forgot about the relationship with A.Y. when she filled out the form. (R-5.)

Alfonso testified that he reviewed petitioner's assignments since she began her employment at NSP. On March 27, 2013, she was assigned to housing unit Echo 100 West. On April 12, 2013, she was assigned housing unit Echo 100 East. On April 21, 2013 she was assigned to Echo 100 LCP, the control panel for ingress and egress to and from the two housing units. On September 24, 2013, A.Y. was assigned to housing unit Echo 100 East.

Alfonso testified that, while assigned to Echo 100 LCP, petitioner was responsible for conducting head counts and monitoring inmates' movements to the yard, the bathroom, to meals, and to religious services, etc. Officers at this post control the doors to the East and West housing units and have a roster of all inmates in those units for purposes of managing the count.

Alfonso testified that, prior to her SID interview of April 26, 2013, petitioner had not disclosed that she knew or ran across the name of A.Y. During the tour and when conducting the head count of inmates, petitioner should have come across A.Y.'s name and should also have actually looked into each cell.

During her SID interview, petitioner stated that the first time that she saw A.Y. was on April 12, 2013, when he approached her to request to have maintenance fix the light in his cell. She stated that she did not recognize him until A.Y. approached her again and identified himself. Petitioner admitted that she did not report the interactions with A.Y. (R-5.)

During the SID interview, petitioner stated that her next interaction with A.Y. was on April 21, 2013. This time he asked petitioner if she could do him a favor by bringing him a cellular telephone. Petitioner stated that she refused the request but did not report it to a supervisor. The next day, on her day off, petitioner went to work and reported the contact. She did not include the fact that A.Y. requested that she bring him a telephone. She was aware that it was a crime for him to do that. (R-5.)

Alfonso testified that he was "concerned" about the statement that petitioner made in her SCR of April 22, 2013. In it petitioner indicated that she had a "brief" relationship with A.Y. prior to his incarceration but had no contact or communication with him prior to April 21, 2013. (R-2.) However, during her interview, petitioner stated that she had a conversation with A.Y. on April 12, 2013. (R-5.) Further, she failed to report that A.Y. asked her to bring him a cellular telephone. (R-5.) Alfonso stated that petitioner had a duty to report all crimes committed by an inmate, and A.Y.'s request for a cellular telephone was a crime that should have been reported immediately.

During the SID interview petitioner stated that she did not charge A.Y. because he knew where her family lived and she was afraid. (R-5.) Alfonso's testimonial response was that law enforcement is a dangerous job and that anyone who chooses the profession knows that before they enter into it.

Alfonso testified that he gathered information regarding A.Y.'s previous places of incarceration. On April 29, 2013, SID received A.Y.'s visitors list for the Union County Correctional Center (UCCC). A.Y. listed petitioner on the list, identified her as a "friend," and included her telephone number. (R-7.) However, there was no record of her having visited A.Y. at the facility and no money sent to him there.

Alfonso testified that he reviewed the inmate telephone system and found that between July 6, 2011, and March 6, 2012, A.Y. made thirty-four calls to petitioner's telephone, eleven of which were completed. Alfonso testified that he had another SID officer review the telephone calls between petitioner and A.Y. to ascertain the nature of their relationship. Alfonso testified that the relationship appeared to be of a personal nature that should have been reported.

Portions of the telephone conversations were played into the record. (R-8.) During one conversation between petitioner and A.Y., petitioner acknowledged that she could not be on A.Y.'s visitor list because at the time she was pursuing an internship at NSP and was preparing to take the test to become a correction officer. (R-4, July 23, 2011.) During the same conversation petitioner told A.Y. that she was "heartbroken" when she had not heard from him. (Ibid.) During conversations held on August 5, and 24, 2011, September 14, 2011, October 28, and 29, 2011, and November 11, 2011, among others, petitioner and A.Y. engaged in conversations regarding their respective personal and intimate lives. During the March 6, 2011, A.Y. stated that he was attempting to get transferred to NSP. In response petitioner stated that she interned there during the summer and would have seen him. Petitioner also gave A.Y. her new telephone number because she was turning off her other telephone. (R-8.)

Sergeant Guy Cirillo (Cirillo), training supervisor, testified on behalf of respondent. He serves as a training sergeant at the Correctional Staff Training Academy (CSTA) in Sea Girt. Cirillo testified that orientation is two to three weeks before the academy starts and during that period the recruits go over a series of documents and instructions. One form that recruits are required to take home on the first day relates to information about incarcerated people. They are given the opportunity to take it home so that they have sufficient time to gather information. Cirillo testified that there are twelve facilities that recruits could be assigned to. NSP is a "residential" facility which requires that the officer live in Newark. As such, any conflicts will result in a transfer of an inmate. He testified that employment with DOC is not jeopardized just because a recruit knows someone who is incarcerated.

Cirillo testified that "undue familiarity" with inmates is emphasized with all new recruits during training. Cirillo testified that he is meticulous about defining the terms inmates, former inmates, incarceration, and unduly familiar relationships so that there is no doubt about under what circumstances a recruit should disclose a relationship. Recruits are given four days to complete the list of relationships with inmates. Further, multiple CSTA training courses emphasize "undue familiarity" and "inmate manipulation." Cirillo testified that he reviewed petitioner's records and she did not submit any documentation of any relationships with any inmates.

Lieutenant Bruce Kerner (Kerner), supervisor of the South Compound, testified on behalf of respondent about the policies applicable to this case. He stated that he had no issues or problems with petitioner personally. Kerner identified the Law Enforcement Personnel Rules and Regulations and stated that they guide the conduct of correction officers. (R-10.) He stated that correction officers are prohibited from having unduly familiar relationships with inmates, and they are required to report any such relationships to the DOC because that would compromise the officer's authority.

Kerner identified the DOC Policy Statement and stated that it addresses staff and inmate familiarity. (R-11.) Kerner testified that under this policy no member of the DOC shall establish or maintain a personal relationship with any inmate. (Ibid.) He stated that "relationship" in this context is one that goes beyond what is required to do the job of a correction officer. Kerner testified that where a relationship existed prior to the correction officer becoming aware of the inmate coming under the jurisdiction of the DOC, he or she must report the relationship in writing to the correctional facility administrator within forty-eight hours of incarceration or becoming aware of the incarceration. (Ibid.) During the initial training in the Academy, these policies are the subject of discussion.

Kerner testified that pursuant to Article II, Section 6 of the Law Enforcement Personnel Rules and Regulations, an officer "shall promptly report in writing through the chain of command all crimes, misconduct, or unusual incidents which come to the

officer's attention during the performance of duty. An officer shall not withhold any information on such matter for any reason." (See R-10.) Kerner testified that an inmate requesting a cellular phone from a correction officer is a crime, and petitioner should have reported it. The inmate would have been placed under temporary close custody (TCC), which is closer supervision, or given administrative segregation. Kerner stated that by failing to disclose that the inmate requested the cellular phone, she failed to do her job as sworn.

Kerner testified that pursuant to Article II, Section 7, of the Law Enforcement Personnel Rules and Regulations, "no officer shall make, or cause to be made, any false or misleading statements. No officer shall intentionally omit or misrepresent facts or information known to the officer." (Ibid.) He further stated that Article II, Section 8 provides that "no officer shall make false or misleading reports." (Ibid.) Kerner stated that correction officers are law enforcement officers; and are therefore held to a higher standard of conduct and that integrity is important to maintaining an officer's trust. He testified that if an officer makes false statements, their word cannot be trusted thereafter.

Kerner testified that HRB 84-17 outlines the possible offenses and penalties governing DOC employee conduct. (R-9.) He stated that the penalty for undue familiarity and falsification each ranges in severity from a written reprimand to removal for a first offense. The penalty range for conduct unbecoming is from a three-day suspension to removal for the first offence. (Ibid.)

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The New Jersey Civil Service Law protects classified employees from arbitrary dismissal and other onerous sanctions. Prosecutor's Detectives and Investigators Ass'n v. Hudson County Bd. of Freeholders, 130 N.J. Super. 30, 41 (App. Div. 1974); Scancarella v. Dep't of Civil Serv., 24 N.J. Super. 65, 70 (App. Div. 1952). The law provides relief to civil service employees from public employers who may attempt to deprive them of their rights. Prosecutor's, supra, 130 N.J. Super. at 41. To this end,

the law is liberally construed. Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). Consistent with this policy of civil service law, there is a requirement that in order for a public employee to be fined, suspended or removed, the employer must show just cause for its proposed action. The Merit System Board is charged with the duty of ensuring that the reasons supporting disciplinary action are sufficient and not arbitrary, frivolous, or "likely to subvert the basic aim of the civil service program." Prosecutor's, supra, 130 N.J. Super. at 42 (quoting Kennedy v. Newark, 178 N.J. 190 (1959)).

Public employees' rights and duties are governed and protected by the provisions of the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and the regulations promulgated pursuant thereto, N.J.A.C. 4A:1-1.1 to 4A:2-6.2. However, public employees may be disciplined for a variety of offenses involving their employment, including the general causes for discipline as set forth in N.J.A.C. 4A:2-2.3(a). An appointing authority may discipline an employee for sufficient cause, including failure to obey laws, rules and regulations of the appointing authority. N.J.A.C. 4A:2-2.3(a)(11). If sufficient cause is established, then a determination must be made on what is a reasonable penalty.

In attempting to determine if a penalty is reasonable, the employee's past record may be reviewed for guidance in determining the appropriate penalty for the current specific offense. The concept of progressive disciplinary action is described in West New York v. Bock, 38 N.J. 500, 519 (1962). In Bock, the officer had received a thirty-day suspension and seventeen minor-disciplinary actions during eight years of service. The prior disciplinary actions and the suspension of thirty days were strongly considered in determining if the thirty-day suspension was warranted. A civil service employee who commits a wrongful act related to his duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). Depending upon the incident complained of and the employee's past record, major discipline may include suspension, removal, etc. Bock, supra, 38 N.J. at 522-24.

In the instant matter, petitioner had no history of previous disciplinary actions. At the time of the initial contact, petitioner had been employed for less than one month.

In disciplinary cases the appointing authority has both the burden of persuasion and production and must demonstrate by a preponderance of the competent, relevant and credible evidence that it had just cause to discipline the officer and lodge the charges. See Coleman v. E. Jersey State Prison, CSV 1571-03, Initial Decision (February 25, 2004), http://njlaw.rutgers.edu/collections/oal/ (citations omitted); see also N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550, 560 (1982); In re Darcy, 114 N.J. Super. 454, 458 (App. Div. 1971); N.J.S.A. 11A:2-6(a)(2), -21; N.J.A.C. 1:1-2.1, "burden of proof"; N.J.A.C. 4A:2-1.4. A preponderance of evidence has been defined as that which "generates belief that the tendered hypothesis is in all human likelihood the fact." Martinez v. Jersey City Police Dep't, CSV 7553-02, Initial Decision (October 27, 2003), http://njlaw.rutgers.edu/collections/oal/ (quoting Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959)).

Inability to Perform Duties, N.J.A.C. 4A:2-2.3(a)(3)

There is no evidence that petitioner exhibited an inability to perform her duties. There is no definition in the New Jersey Administrative Code for inability to perform duties pursuant to N.J.A.C. 4A:2-2.3(a)(3). However, case law has determined a charge of inability to perform duties is appropriate where is the employee is incapable of carrying his or her own weight. Klusaritz v. Cape May County, CSV 2690-98, Initial Decision (May 13, 2002), adopted, Merit Sys. Bd. (October 25, 2002), http://njlaw.rutgers.edu/collections/oal/final/csv2690-98.pdf (where appellant failed to complete assignments accurately, failed to follow prescribed formats and submitted inaccurate work); Richard Stockton College v. Parks, CSV 4279-03, Initial Decision (January 31, 2005), adopted, Merit Sys. Bd. (April 3, 2005), http://njlaw.rutgers.edu/collections/oal/final/csv4279-03.pdf (where respondent failed prioritize and complete tasks in a timely manner). It is clear here, as in the above-mentioned cases, that petitioner failed to complete her duty or reporting a relationship

with an inmate during the orientation period and failed to fully disclose the substance contact that she had with the inmate on the job. However, there is no evidence that she was unable to perform her duties. Therefore, respondent did not prove that petitioner is unable to perform her duties, and I **CONCLUDE** that the charge of inability to perform duties should be dismissed.

Conduct Unbecoming, HRB 84-17 (as Amended)

Petitioner engaged in conduct unbecoming a public employee. The New Jersey Department of Corrections Law Enforcement Personnel Rules and Regulations sets forth the appropriate conduct for Corrections officers. The Rules and Regulations states in part,

> Article II
>
> . . .
>
> Section 6
>
> An officer shall promptly report in writing through the chain of command all crimes, misconduct or unusual incidents which comes to the officer's attention during the performance of duty.
>
> Section 7
>
> No officer shall make, or cause to be made, any false or misleading statements.
> No officer shall intentionally omit or misrepresent facts or information known to the officer.
>
> Section 8
>
> No officer shall make false or misleading reports.
> No officer shall alter or tamper with official reports.
> No officer shall enter, in any official book or record, any false or misleading statements.

Article III

. . .

Section 4

No officer shall become unduly familiar with inmates who are incarcerated, on community release, or on parole status. An officer shall report all prior relationships with inmates or parolees in writing to the Administrator, Superintendent or Agency Chief.

[R-10.]

In the within matter, respondent asserts, and I agree, that petitioner violated the Law Enforcement Rules and Regulations by violating these provisions. Petitioner failed to disclose her relationship with A.Y. in the orientation receipt form. Petitioner violated these provisions when she failed to report the initial contact that she had with A.Y. while working at NSP. Petitioner violated these provisions when she failed to immediately report the second contact with A.Y. Finally, petitioner violated these provisions when, after reporting the second contact with A.Y. while in NSP, she failed to disclose that A.Y. committed a criminal act. Accordingly, there is sufficient evidence in the record to support the charge of conduct unbecoming an employee, and I, therefore, **CONCLUDE** that the charge of conduct unbecoming a public employee is sustained.

Falsification: Intentional Misstatement of Material Fact in Connection with Work, Employment Application, Attendance, or in any Record, Report, Investigation or Proceeding, HRB 84-17 (as Amended)

In the recordings of petitioner's telephone conversations with A.Y., she can be heard discussing the fact that she cannot be included on A.Y.'s "visit list" because she is preparing to take the exam to become a correction officer and was attempting to secure an internship at NSP. This is evidence that at the time that she completed the orientation receipt form, petitioner was aware of A.Y.'s incarceration. During the SID Interview, petitioner was heard to say that she did not report her relationship with A.Y. because "the relationship was over" and she did not think of him. However, I **CONCLUDE** that the failure to report this information during the orientation violates the

provisions of the Human Resources Bulletin as Amended and the Law Enforcement Personnel Rules and Regulations. I further **CONCLUDE** that petitioner's failure report that AY requested a cellular telephone when she reported the second contact with A.Y., also violates the provisions of the Human Resources Bulletin as Amended and the Law Enforcement Personnel Rules and Regulations. Accordingly, there is sufficient evidence in the record to support the charge of intentional misstatement of material fact in connection with work, in a record and report, and I, therefore **CONCLUDE** that this charge is sustained.

Improper or Unauthorized Contact with Inmates, Undue Familiarity with Inmates, Parolees, their Families, or Friends HRB 84-17 (as Amended)

For the above-stated reasons, I **CONCLUDE** that petitioner violated provisions of the Human Resources Bulletin as Amended and the Law Enforcement Personnel Rules and Regulations. I therefore **CONCLUDE** that the charge of violating improper or unauthorized contact with inmates, undue familiarity with inmates, parolees, their families, or friends is sustained.

Violation of a Rule, Regulation, Policy, Procedure, Order or Administrative Decision HRB 84-17 (as Amended)

For the above-stated reasons, I **CONCLUDE** that petitioner violated provisions of the Human Resources Bulletin as Amended and the Law Enforcement Personnel Rules and Regulations. I therefore **CONCLUDE** that the charge of violating a rule, regulation, policy, procedure, order or administrative decision is sustained.

Other Sufficient Cause, N.J.A.C. 4A:2-2.3(a)(12)

Respondent failed to prove that other sufficient causes existed pursuant to N.J.A.C. 4A:2-2.3(a)(12). There is no definition in the New Jersey Administrative Code for other sufficient cause. Other sufficient cause is generally defined in the charges

against petitioner. The charge of other sufficient cause has been dismissed when "respondent has not given any substance to the allegation." Simmons v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm'r (April 26, 2006), <http://njlaw.rutgers.edu/collections/oal/final/csv9122-99.pdf>. The FNDA does not identify or sustain charges for other sufficient cause. Therefore, respondent has not proven by any competent and credible evidence that petitioner should be terminated for other sufficient cause, and I **CONCLUDE** that the charge of other sufficient cause should be dismissed.

PENALTY

Public employees' rights and duties are governed and protected by the provisions of the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and the regulations promulgated pursuant thereto, N.J.A.C. 4A:1-1.1 to 4A:2-6.2. However, public employees may be disciplined for a variety of offenses involving their employment, including the general causes for discipline as set forth in N.J.A.C. 4A:2-2.3(a). An appointing authority may discipline an employee for sufficient cause, including failure to obey laws, rules and regulations of the appointing authority. N.J.A.C. 4A:2-2.3(a)(11). If sufficient cause is established, then a determination must be made on what is a reasonable penalty.

In attempting to determine if a penalty is reasonable, the employee's past record may be reviewed for guidance in determining the appropriate penalty for the current specific offense. The concept of progressive disciplinary action is described in West New York v. Bock, 38 N.J. 500, 519 (1962). In Bock, the officer had received a thirty-day suspension and seventeen minor-disciplinary actions during eight years of service. The prior disciplinary actions and the suspension of thirty days were strongly considered in determining if the thirty-day suspension was warranted. A civil service employee who commits a wrongful act related to his duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). Depending upon the incident complained of and the employee's past record, major discipline may include suspension, removal, etc. Bock, supra, 38 N.J. at 522-24.

In disciplinary cases the appointing authority has both the burden of persuasion and production and must demonstrate by a preponderance of the competent, relevant and credible evidence that it had just cause to discipline the officer and lodge the charges. See Coleman v. E. Jersey State Prison, CSV 1571-03, Initial Decision (February 25, 2004), http://njlaw.rutgers.edu/collections/oal/ (citations omitted); see also N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550, 560 (1982); In re Darcy, 114 N.J. Super. 454, 458 (App. Div. 1971); N.J.S.A. 11A:2-6(a)(2), -21; N.J.A.C. 1:1-2.1, "burden of proof"; N.J.A.C. 4A:2-1.4. A preponderance of evidence has been defined as that which "generates belief that the tendered hypothesis is in all human likelihood the fact." Martinez v. Jersey City Police Dep't, CSV 7553-02, Initial Decision (October 27, 2003), http://njlaw.rutgers.edu/collections/oal/ (quoting Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959)).

In the present case, Petitioner has no history of prior disciplinary action. The minimum penalty for a first offense for conduct unbecoming is a three-day suspension. (R-9). The minimum penalty for a first offense for falsification is an official written reprimand. Ibid. The minimum penalty for a first offense for improper or unauthorized contact with inmates, undue familiarity with inmates, parolees, their families, or friends is an official written reprimand. Ibid. The minimum penalty for a first offense for violation of a rule, regulation, policy, procedure, order or administrative decision is an official written reprimand. Ibid.

Petitioner had not completed a full month of employment. The undersigned had the opportunity to observe her demeanor during the SID interview and during the hearing. Petitioner is a young, inexperienced young lady who made ill-advised, naive and immature decisions in this case. I **CONDLUDE** that the appropriate penalty in this matter is a 30-day suspension for each sustained offense, for a total of 120 days suspension.

ORDER

Based upon the foregoing and the Notice of Final Disciplinary Action, it is hereby **ORDERED** that the charges of conduct unbecoming an employee; intentional misstatement of material fact; undue familiarity with inmates; and violation of rules, regulations policies and procedures, be **SUSTAINED.** It is further **ORDERED** that the charges of inability to perform duties, and other sufficient cause be **DISMISSED.**

I also **ORDER** that the determination of respondent, Northern State Prison, Department of Corrections, to remove petitioner, effective May 28, 2013, be **REVERSED** and a suspension of 120 days be imposed.

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.