A-7

STATE OF NEW JERSEY

In the Matter of David Kenney
Burlington County Jail

CSC DKT. NO. 2014-52
OAL DKT. NO. CSV 9658-13

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: April 1, 2015 PM

The appeal of David Kenney, a County Correction Officer with the Burlington County Jail, 20-day suspension, on charges, was heard by Administrative Law Judge Joseph A. Ascione, who rendered his initial decision on March 12, 2015. Exceptions were filed on behalf of the appellant.

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 April 1, 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. The Commission therefore affirms that action and dismisses the appeal of David Kenney.

Re: David Kenney

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
APRIL 1, 2015

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 9658-13
AGENCY DKT. NO. 2014-52

IN THE MATTER OF DAVID KENNEY,
BURLINGTON COUNTY JAIL.

Mark W. Catanzaro, Esq., for appellant David Kenny

Michael V. Madden, Esq., for respondent Burlington County Jail (Madden & Madden, P.A., attorneys)

Record Closed: September 11, 2014 Decided: March 12, 2015

BEFORE **JOSEPH A. ASCIONE,** ALJ:

STATEMENT OF THE CASE

On July 3, 2013, appellant, correction officer (CO) David Kenney, timely appealed his June 26, 2013, twenty-day suspension by Burlington County on charges of violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(7), neglect of duty, and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause: violation of Burlington County Detention Center Policy and Procedures Sections 1023 and 1170, specifically, not reporting the State of New Jersey's execution of a search warrant at appellant's residence on October 30, 2008. Appellant acknowledges that he

did not report the incident, but disputes whether any obligation to report existed under the policies and procedures that were in effect at the time of the incident.

PROCEDURAL HISTORY

On October 30, 2008, an Amended Preliminary Notice of Disciplinary Action (PNDA) (R-7) was issued against Kenney, with the specifications identified above. On May 30, 2013, Kenney received his disciplinary hearing on the PNDA. The charges were sustained, and on June 26, 2013, a Final Notice of Disciplinary Action (FNDA) (R-6) was issued notifying appellant of his suspension for twenty working days, dates to be determined. After issuance of the FNDA and notice of appeal, this matter was transmitted by the Civil Service Commission to the Office of Administrative Law, where it was filed on July 10, 2013, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A hearing was held on August 13, 2014. At that time, the parties requested time to submit written closing statements and legal memorandums. The record closed on September 11, 2014, upon the receipt of the post-hearing submissions.

FINDINGS OF FACT

The parties stipulated to the following **FACTS**:

1. Appellant, David Kenney, is a Burlington County correction officer. (R-19.)

2. Respondent, Burlington County Jail ("the Jail"), is located at 54 Grant Street, Mt. Holly, New Jersey 08060.

3. On February 6, 2006, appellant was hired by the Jail.

4. On February 6, 2006, appellant received and acknowledged receipt of the Jail's Standard Operating Policies and Procedures (SOP) Manual, Book #357. (R-5.)

5. The Jail's SOP Manual provides, regarding Sections 1012–1074, effective January 1, 2004:

> Any officer or employee shall be subject to reprimand, suspension from duty with loss of pay, reduction in rank or dismissal, depending upon the nature and seriousness of the offense, for any violation of the following rules, regulations, other policies, procedures and post orders contained within this manual.
>
> [R-4.]

Section 1023 provides:

> All law enforcement officers of the Burlington County Correction Department shall be responsible to observe, comply, strictly adhere and enforce all rules, regulations and to follow the policies and procedures contained herein and any amendment promulgated and approved by the Jail Administrator.
>
> [Ibid.]

6. The Jail's SOP Manual provides at Section 1170, effective January 1, 2004, under "Policy":

> The timely reporting of all incidents occurring while on-duty and certain incidents occurring while off-duty relating to employment and/or having impact upon jail security are required to be reported in writing to the jail administrator (warden), deputy warden or his designee (the facility's chief of security). Incidents that happen while off duty must be reported within twenty-four (24) hours and/or the next working day unless otherwise specified. Failure to report an incident as described below may result in administrative disciplinary action and/or civil or criminal liability.
>
> [R-3.]

7. The Jail's SOP Manual provides at Section 1170, effective January 1, 2004, under "Procedure," in pertinent part:

> B. Reporting Incidents Occurring While "Off-Duty"
>
> It is the officer's duty and responsibility to report in writing to the Jail administrator (warden), deputy warden, and/or his designee (chief of security unless otherwise specified) within twenty-four (24) hours and/or the next working day (prior to the closing of the administrative office) any incident involving the following:
>
> > 6. Other: Any incident or receipt of information that may threaten institution security, confidential information being reported outside of the Jail, which may negatively impact upon the Jail.
>
> [Ibid.]

8. On October 30, 2008, appellant was scheduled to work at the Jail from 7:00 a.m. to 3:00 p.m. (R-18.)

9. On October 30, 2008, at approximately 6:00 a.m., the New Jersey State Police, investigating appellant on charges of endangering the welfare of children and possession of child pornography, executed a court-authorized search warrant on appellant's home. (R-12; R-13; R-14.)

10. During the execution of the search warrant, appellant was restrained and secured, and his residence was searched. (Ibid.)

11. A New Jersey State Police trooper read appellant his Miranda rights. Appellant acknowledged the reading of the rights at 6:11 a.m.

12. The State Police seized a number of items from appellant's home in execution of the search warrant.

13. On October 30, 2008, at 6:30 a.m. appellant called out of work for his shift that day.

14. On March 17, 2010, State Trooper G. M. Williams concluded that there was not enough probable cause to support a charge of violation of N.J.S.A. 2C:24-4.

15. On January 31, 2013, the Jail served appellant a Preliminary Notice of Disciplinary Action charging him with conduct unbecoming a public employee, neglect of duty, and other sufficient cause, specifically, violation of Policy and Procedures Sections 1023 and 1170, for failure to report an incident that occurred on "October 8, 2012." (R-8.)

16. On March 31, 2013, the Jail served appellant an Amended Preliminary Notice of Disciplinary Action that revised the date of the incident giving rise to the charges, and correctly identified the date of the incident as October 30, 2008. (R-7.)

17. On June 26, 2013, the Jail served appellant a Final Notice of Disciplinary Action, which provided for a twenty-working-day suspension. (R-6.)

TESTIMONY

The respondent provided testimony from Internal Affairs officer Scott Strohmetz and lieutenant Matthew Lieth.

Scott Strohmetz testified to his twenty-four years' employment with the Jail. In December 2006 the Jail assigned him to Internal Affairs, where he served during the course of this investigation of appellant. In December 2012, in connection with an unrelated contact with the State Police, he became aware of the execution of a search warrant at the appellant's home in October 2008. This knowledge resulted in the institution of an Internal Affairs investigation of the appellant. On January 23, 2013,

Strohmetz interviewed the appellant. Appellant admitted to the October 2008 incident and understood it to be part of an investigation of him, but advised Strohmetz that in the absence of an arrest or other proceeding he saw no obligation to report the incident to the Jail. Appellant acknowledged his receipt and reading of the SOP. Appellant told Strohmetz that he was not considering whether the criminal investigation would negatively impact the Jail, he was more concerned with himself.

Stohmetz testified that Exhibit P-1 depicts Section 1170 of the SOP, effective November 1, 2004, and revised June 1, 2012.[1]

Strohmetz testified that if appellant had timely advised the Jail of the October 2008 incident, the Jail administration could have moved appellant to another area of the Jail with less responsibility, or less contact with inmates. The Jail did not change appellant's post assignment after it became aware of the incident sometime in December 2012. In connection with the Internal Affairs investigation, Strohmetz knew that no State charges would be filed against appellant; that matter had closed in 2010.

Lieutenant Matthew Leith testified to his employment with the Jail. He had been assigned as a shift commander for six years prior to assuming responsibility as the administrative lieutenant. In connection with his duties he reviews policies and procedures. He referenced SOP Section 1023, which requires all Jail employees to observe, comply with, and strickly adhere to the policies and procedures contained in the SOP Manual. Leith further testified to the Jail's instruction of employees on the issue of conduct on and off duty. Two weeks of instruction are given in basic training, two weeks of instruction are given during on-the-job training, and two weeks of instruction are given at the Police Academy. The Academy training is not Jail-specific, but general training.

Leith testified that had appellant timely filed a report of the October 2008 incident, the Jail could have made inquiries regarding the incident and taken action to

[1] Appellant's counsel provided P-1 at the time of the hearing, not prior to the hearing as required by the prehearing order. I reserved the right to reject P-1 in evidence or otherwise sanction appellant's counsel for the late submission of P-1. P-1 is admitted into evidence without sanction.

reduce appellant's contact with inmates if the facility felt that action were warranted. Failure to report such incidents is a safety concern for the staff.

The appellant chose not to testify, leaving respondent to support its discipline on the documentary evidence, the joint stipulation of facts, and the credible testimony provided by Strohmetz and Lieth.

DISCUSSION

The version of Section 1170 that existed at the time of the incident was submitted as R-3, and is quoted above in stipulated facts 6 and 7. Section 1170 as revised June 1, 2012, was submitted as P-1. Subsection B-6 of the revised policy states that it is an officer's duty to report:

> 6. Other: Any incident or information which may negatively impact upon the jail and/or any information that may threaten security.

Further, in the revised version of the policy, subsection B-7 was added, which reads:

> 7. Any contact with a law enforcement agency must be reported immediately to the department. This includes, but [is] not limited to, the officer being questioned, victim, witness, or suspect.

The specifications of the PNDA and FNDA did not address the suspected conduct of the appellant underlying the State Police investigation. This tribunal, upon objection by appellant, rejected the respondent's attempt to introduce the State Police report prepared in connection with the investigation of the matter, as appellant made no statement in connection with the report that would provide an exception to the hearsay rule. Further, no witness testified regarding the specifics of the State Police's execution of the search warrant and its investigation. Absent a residuum of competent evidence, the report was excluded. This is not fatal to respondent's discipline, as appellant acknowledged the execution of the warrant and knowledge of the investigation, including receipt of his Miranda warning.

ADDITIONAL FINDINGS OF FACT

Based on the credible testimony and the documentary evidence, I **FIND** the following additional **FACTS**:

18. On December 13, 2012, Strohmetz while investigating another matter, became aware of the 2008 execution of a search warrant at the residence of appellant.

19. The execution of the search warrant at his residence and the reading of Miranda rights provided notice to appellant that he was under investigation for criminal activity.

LEGAL ANALYSIS AND CONCLUSION

Civil-service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil-service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 11A:1-2(a). Such an employee 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).

An appeal to the Civil Service Commission requires the OAL to conduct a de novo hearing to determine the employee's guilt or innocence, as well as the appropriate penalty if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987).

The burden of persuasion falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The appointing authority must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

The appellant herein is charged with violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, specifically, violation of the SOP Manual, Sections 1023 and 1170.

"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)).

"Neglect of duty" has been interpreted to mean that "an employee . . . neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009) (citation omitted), adopted, Civil Service Commission (March 27, 2009), <http://njlaw.rutgers.edu/collections/oal/>. The term "neglect" means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" means conformance to "'the legal standard of reasonable conduct in the light of the apparent risk.'" Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job.

The appellant has also been charged with "other sufficient cause," in this case not reporting the State Police's execution of a search warrant at appellant's residence on October 30, 2008.

Appellant's statement to Strohmetz during the Internal Affairs investigation reveals appellant's thought process at the time of the incident on October 30, 2008. He did not realize he had an obligation to report the incident under SOP Section 1170, or otherwise. In 2008 appellant worried about his personal situation as a result of the exercise of the search warrant; he was not concerned whether the incident would negatively impact the Jail. Appellant did not face arrest, indictment, or a criminal information, which in his mind would have triggered an obligation to report. The State Police and prosecutor's office investigated him, but, according to appellant, he thereafter was not contacted by either entity. Ultimately, no charges were lodged against the appellant. However, the question here is appellant's knowledge of the investigation, and whether that knowledge triggered an obligation on the part of appellant as a correction officer to report the incident to the Jail.

Police officers are held 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). This is equally true to correction's officers.

I **CONCLUDE** that respondent has met its burden of proof as to the charges of violation of N.J.A.C. 4A:2-2.3(a)(6) (conduct unbecoming), N.J.A.C. 4A:2-2.3(a)(7) (neglect of duty), and violation of N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, specifically, violation of SOP Sections 1023 and 1170. As it existed at the time of the incident, Section 1170 imposed on officers a duty to report events that may threaten institution security. Although a later revised version of that section specifically states a duty to report "[a]ny contact with a law enforcement agency," the applicable earlier version of Section 1170 encompasses a duty to report incidents such as the event that occurred at appellant's residence on October 30, 2008. The failure to report an ongoing criminal investigation is a serious offense that involves public, staff and inmate-safety issues. The execution of the search warrant at appellant's residence, the physical restraint of appellant at the initiation of that process, and the seizure and retention of items from appellant's home and the reading of Miranda rights, provided notice to appellant that he was under investigation for criminal activity. Appellant neglected his duty to report the incident of October 30, 2008, and this failure to report constituted failure to comply with the policies and procedures of the Jail. The knowledge triggered an obligation on appellant to promptly advise the warden or deputy warden of the events that had transpired. No matter what the correction officer considers the likelihood of an arrest, indictment or criminal information, Jail management must be in a position to make a reasonable determination of what, if any, action to take regarding the assignment of an officer who is the subject of an ongoing criminal investigation. Appellant's action deprived the Jail of taking any action that might have been determined appropriate to fulfill its obligations and duties to the public and the staff of the facility. Appellant's failure to act in accordance with the higher standard of conduct expected of a law enforcement officer and the proper operation of the facility constitutes conduct unbecoming. An arrest, indictment or criminal

information is not a prerequisite to the obligation to report the investigation once appellant knew of it.

PENALTY

When dealing with the question of penalty in a de novo review of a disciplinary action against a civil-service employee, the proofs and penalty on appeal based on the charges presented must be evaluated. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962). Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. West New York v. Bock, supra, 38 N.J. at 522–24. Major discipline may include removal, disciplinary demotion, and suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions evaluated by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

Kenney's prior disciplinary history (R-20) reflects several counselings and letter reprimands from 2006 through January 2014; a one-day suspension in September 2008; a five-day suspension in December 2008; and a ten-day suspension in January 2013. A reasonable calculation of progressive discipline in the presence of the prior disciplinary actions, the conduct of the appellant, and the current violations is a twenty-day suspension.

Accordingly, I **CONCLUDE** that the respondent's imposition of a twenty-day suspension is appropriate.

ORDER

For the reasons stated above, I hereby **ORDER** that appellant's appeal is **DISMISSED**, and respondent's proposed twenty-day suspension of Kenney is **AFFIRMED** based upon appellant's violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(7), neglect of duty, and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, specifically, violation of SOP Sections 1023 and 1170.

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.

March 12, 2015
DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 3/12/15

Date Mailed to Parties: March 13, 2015

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APPENDIX

LIST OF WITNESSES

For Appellant:

None

For Respondent:

Officer Scott Strohmetz
Lieutenant Matthew Lieth

LIST OF EXHIBITS

For Appellant:

P-1 Policies and Procedures

For Respondent:

R-1 Burlington County Detention Center Policy Section1079
R-2 Burlington County Detention Center Policy Section 1080
R-3 Burlington County Detention Center Policy Section 1170
R-4 Burlington County Detention Center Policies and Procedures, Sections 1012–1074
R-5 February 6, 2006, acknowledgement executed by Appellant, David J. Kenney, for the Burlington County Standard Operating Policies and Procedures Manual
R-6 Final Notice of Disciplinary Action, dated June 26, 2013
R-7 Amended Preliminary Notice of Disciplinary Action, dated March 21, 2013
R-8 Preliminary Notice of Disciplinary Action, dated January 31, 2013
R-9 Omitted
R-10 January 30, 2013, Recommendation of Charges

R-11 January 23, 2013, Burlington County Department of Corrections Internal Affairs Investigation Report

R-12 November 11, 2008, New Jersey State Police Supplemental Investigation Report (only pages 6 to 9 of the report)

R-13 Omitted

R-14 Search Warrant Order, dated October 29, 2008

R-15 Evidence receipts, dated November 5, 2008, and December 8, 2008

R-16 Miranda Warning acknowledgement, dated October 30, 2008

R-17 Taped statement of Officer David Kenny, dated January 23, 2013

R-18 Burlington County Detention Center Daily Shift Report for Octo0ber 30, 2008

R-19 Appellant's Officer Profile

R-20 Appellant's Disciplinary History with the Burlington County Detention Center (SEALED)

R-21 Appellant's acknowledgement of the administrative investigation, dated January 23, 2013

R-22 Omitted

R-23 Omitted

R-24 Omitted