

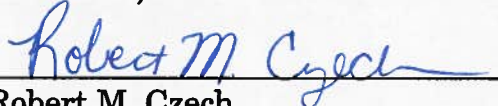
ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Drake Baranyi.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C. 4A:2-2.12*. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10* and *N.J.A.C. 4A:2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION
APRIL 15, 2015


Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P. O. Box 312
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attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 15644-13

AGENCY DKT. NO. 2014-1022

**IN THE MATTER OF DRAKE
BARANYI, DEPARTMENT OF
CORRECTIONS.**

Arnold S. Cohen, Esq., for appellant (Law Offices of Oxfeld Cohen P.C.,
attorneys)

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

Record Closed: February 10, 2015

Decided: March 25, 2015

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

STATEMENT OF THE CASE

Appellant, Drake Baranyi, Senior Repairer, Department of Corrections (DOC), appeals a fifteen day suspension for conduct unbecoming, insubordination, intentional disobedience or refusal to accept order, assaulting or resisting authority, disrespect or the use of insulting or abusive language to a supervisor, threatening, intimidation, harassing, coercing or interfering with fellow employees on State property and other sufficient cause. DOC contends that a stick figure drawing portraying his co-workers

and his boss and a photo which had eyeglasses drawn on several people constituted a violation of the foregoing rules.

PROCEDURAL HISTORY

On July 19, 2013, the respondent issued a Preliminary Notice of Disciplinary Action imposing a twenty day suspension of appellant. Following a hearing, respondent issued a Final Notice of Disciplinary Action on September 30, 2013, sustaining the charges and reducing the suspension to fifteen days. The appellant requested a hearing and the matter was filed at the Office of Administrative Law (OAL), on October 25, 2013, to be heard as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on February 10, 2015, and the record closed on that date.

FINDINGS OF FACT

The following facts are not in dispute:

Appellant is a Senior Repairer at the Central Office of the New Jersey Department of Corrections, where he has worked since January 1, 1990. His primary responsibilities are maintenance of the various DOC facilities. In that capacity, he transports and supervises inmates who perform various maintenance duties. The responsibilities are primarily janitorial services, painting and some basic repair duties. He is assigned a State van, which is used exclusively by him during working hours. On November 7, 2012, Roy Cobb, a co-worker had to move Mr. Baranyi's state issued van to another location on the site. While he was in the van, he found a picture that Mr. Baranyi had drawn, under a calendar on the console of the van.

The drawing portrays Mr. Baranyi, his co-workers and his boss as stick figures. One individual has a plunger in his hand and another has a hammer. One stick figure is smoking a pipe and wearing a shirt that says "Super Boss." This figure is blowing smoke at another figure, who is "coughing." There are several other smaller stick

figures in red and a notation under the drawing which states "Team Work Award 2002." Mr. Cobb and Mr. Thompson claim that they are depicted as the stick figures with a plunger and a hammer respectively. They brought the picture to the attention of their supervisor and filed a hostile work environment complaint, alleging that the picture was "disturbing" and made them feel threatened.

In addition, a photograph was found in Dullard Building, where some of the maintenance employees had offices. The photograph, which was of the actual Team Work Award from 2012, had been altered and eye glasses drawn on several of the employees. The respondent alleges that the appellant drew the glasses and Mr. Cobb and Mr. Thompson perceived it as threatening in some way. The complaint was forwarded to the Special Investigations Unit (SIU), who conducted an investigation. As a result of the investigation, a disciplinary notice seeking a twenty day suspension was served on appellant. After a departmental hearing, the charges were sustained but the penalty was reduced to fifteen days. Mr. Baranyi was ordered to undergo a psychological examination as a result of the charges. The evaluation concluded that Mr. Baranyi was neither a threat to himself or his co-workers.

TESTIMONY

For respondent:

Valisa Leonard is a special investigator for the SIU Department of Corrections. She was contacted on November 30, 2012, to conduct an investigation into a hostile work environment claim made by Roy Cobb and Thomas Harrison, who worked in the Central Office Headquarters of DOC. She testified that the allegations involved a drawing that was found in Mr. Baranyi's van. She had received a copy of the drawing, which was labeled "Team Work Award 2002." She testified that the drawing depicted four large stick figure caricatures. One of the figures had a plunger, one had a hammer, and one with a pipe in his mouth was labeled "super boss." The last stick figure was next to the "Super Boss" and was coughing from the smoke. Ms. Leonard interviewed

Mr. Cobb and Mr. Thomas, who both reported a history of not getting along with Mr. Baranyi. They told her that they thought the picture was "creepy" and "threatening. Roy Cobb and Thomas Harrison reported the picture to their immediate supervisor, Jeff Tinsman, who reported it to his supervisor, Wilson Bulivant. They also found a photograph in the Dillard Building in Mr. Baranyi's work area which was a photo of the actual Team Work Award. The photograph had eyeglasses drawn on Mr. Cobb, Mr. Harrison, and one other individual. Mr. Cobb and Mr. Thomas told Ms. Leonard that they found this disturbing.

Ms. Leonard interviewed Wilson Bulivant, the engineer in charge of maintenance staff at the Central Office. Mr. Bulivant told Ms. Leonard that he did not report the incident right away because he was busy and then he went on vacation. He advised her that upon return to work, he reported it to Director Ricci who sent the matter to SIU for an investigation. Ms. Leonard interviewed Mr. Baranyi, who admitted that he drew the picture, but said it was just a silly doodle and nothing was meant by it. Ms. Leonard also received a copy of the photograph of the Team Work Award, in which eyeglasses were drawn on several of the employees. The photo was found in the Dillard building in an area where Baranyi works. She stated that Mr. Baranyi denied drawing eyeglasses on the photograph. Ms. Leonard testified that she prepared a report of her investigation and turned it over to Director Ricci. Ms. Leonard testified that she only prepares a report and has no role in the determination with respect to disciplinary charges.

Wilson Bulivant is the Chief Engineer in charge of maintenance at the Central Office of the Department of Corrections. He is the supervisor of the employees involved in this matter. Mr. Bulivant testified that there have been problems between these employees over the years. He testified that the drawing was taken out of Mr. Baranyi's van by Mr. Cobb and brought to his attention. He testified that when they brought the drawing to his attention and provided written statements advising that they felt threatened or insulted by the picture, he felt he had to report it to the Director. He testified if they had not wanted to file a complaint, he probably would have just had a conversation with Mr. Baranyi and told him to "knock it off" or something like that. He

testified that he did not feel threatened by the drawing and was aware that he was called "Super Boss," which he did not mind. He acknowledged that he smokes a pipe, and the stick figure smoking a pipe with the Super Boss T-shirt was him.

Jeffrey Tinsman is also employed at the Central Office of the Department of Corrections. He is Wilson Bulivant's assistant, and has been handling maintenance at the Central Office for seventeen years. The drawing was brought to his attention by his plumber, Roy Cobb who advised him that he found the drawing in Baranyi's van. He testified that it is a state van, but Baranyi drives it ninety-nine percent of the time. He was not aware of anyone else who uses the van. The only reason that Cobb was in the van was to move it to make room for some other vehicles on a day that Baranyi was not working. When Mr. Cobb told him that the drawing made him nervous and he did not appreciate it, I advised him that I would bring it to Mr. Bulivant's attention. He testified that both Mr. Cobb and Mr. Harrison were "visibly shaken" when they came to see him about the picture. He also testified that he saw the photograph which had eyeglasses drawn on Mr. Cobb and Mr. Harrison.

Thomas Harrison is a carpenter for the Central Office of the Department of Corrections. He testified that sometime in November 2012, Roy Cobb, was moving Baranyi's van and found a drawing, and brought it to his attention. Mr. Harrison testified that he was taken aback by the drawing and found it disturbing. He testified that the carpenter in the picture was him and the plumber was Mr. Cobb. He stated that there is only one carpenter and one plumber at the Central Office. He stated that he did not know what the red stick figures were, but they were disturbing to him. He testified that he has had his issues with Mr. Baranyi over the years, and he tries to just keep his distance from him. For example, if Mr. Baranyi sits down at a table, he would get up and leave. He testified that it is just stupid juvenile stuff that has happened over the years. He was also shown the photograph in which eyeglasses were drawn on him. He said it was disturbing to him, like he was being targeted or ridiculed. He testified that he has had problems with Mr. Baranyi in the past and that "he keeps his distance from him."

For appellant:

Drake Baranyi testified that he is employed as a Senior Repairer for the Central Office of the New Jersey Department of Corrections. His responsibilities include supervising inmates with cleaning and maintenance duties. He testified that he drives the van where the drawing was found, and acknowledged that he drew the picture. He testified that he did not mean anything by the picture and that he was just doodling. He testified that it was under a calendar on the console of the van and was not even visible. He testified that the stick figures were not intended to be anyone in particular, except the "super boss" was Mr. Bulivant. He said Mr. Bulivant smokes a pipe and it bothers him since he has asthma. He stated that he does call Mr. Bulivant "super boss" sometimes and it's kind of a joke. He testified that the figure was sort of a Ziggy type figure and there was nothing intimidating or threatening about the picture. Mr. Baranyi testified that he did not draw the eyeglasses in the picture found at the Dillard Building, and that many people have access to that area.

FINDINGS OF FACT

In view of the contradictory testimony presented by appellant and the respondent witnesses, the resolution of the charges against Ms. Baranyi requires that I make a credibility determination with regard to the critical facts. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experiences and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. Super. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718,749 (1963). A fact finder is

free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth. In re Perrone, 5 N.J. Super. 514. 521-22 (1950). See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses, it is my view that Mr. Baranyi was truthful and credible. His testimony was consistent with the written statements and the other facts presented at the hearing. I also found Ms. Leonard's testimony to be truthful and credible. Ms. Leonard reported the facts as presented by the complaining witnesses. I found Mr. Bulivant and Mr. Tinsman to be truthful and credible. I found that the testimony of Mr. Harrison with regard to being fearful of the stick figure drawing not credible.

Accordingly, **I FIND:**

1. Drake Baranyi has been employed as a maintenance worker at the Department of Corrections, Central Office since January of 1990.
2. Roy Cobb, Thomas Harrison and Jeffrey Tinsman are also employed at the Central Office of the Department of Corrections and are co-workers of Mr. Baranyi.
3. Wilson Bulivant is the chief engineer and the supervisor of Drake Baranyi, Roy Cobb, Thomas Harrison and Jeffrey Tinsman.
4. Mr. Baranyi is assigned a state van which is used exclusively by him during work hours.
5. On November 7, 2012, Mr. Cobb found a stick figure drawing in Mr. Baranyi's van. It was a caricature type drawing which resembled a photo of an award that the team had received in 2002.

6. Mr. Cobb took the picture and showed it to Mr. Harrison, who both reported to their supervisor that they felt intimidated and threatened by it.
7. Mr. Bulivant, who was clearly depicted in the stick figure drawing, felt neither intimidated or threaten by it, but felt obligated to report the concerns of Harrison and Cobb.
8. Mr. Cobb and Mr. Harrison have had long standing issues with Mr. Baranyi and are not friends.
9. The stick figure drawing was in the van which was used exclusively by Mr. Baranyi and was covered by a calendar.
10. The stick figure drawing does not portray any violence.
11. A photograph was found in the offices shared by several employees. Eyeglasses had been drawn of several of the employees.

LEGAL DISCUSSION AND CONCLUSION

The Civil Service employees' rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12.6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointment and broad tenure protection. See Essex Council Number 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1971); Mastrobattista v. Essex County Park Commission, 46 N.J. Super. 138, 147 (1965). The Act also recognizes that the public policy of this State is to provide public officials with appropriate appointment, supervisory and other personnel authority in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

This matter involves a major disciplinary action brought by the respondent appointing authority against appellant. 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 appointing authority has the burden of proof and must establish by a fair preponderance of the credible evidence that the employee was guilty of the charges. Atkinson v. Parsekian, 37 N.J. Super. 143 (1962); In re Polk Licence Revocation, 90 N.J. Super. 550 (1980). Evidence is found to preponderate if it establishes that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. Super. 487 (1962).

The appellant has been charged with the following offenses:

1. Conduct Unbecoming a Public Employee. N.J.A.C. 4A:2.2-3(a)(c)(6);
2. Other Sufficient Causes. N.J.S.A. 4A:2-2.3(a)(12);
3. Insubordination HRB 84-17, as amended C.11 Conduct unbecoming an employee; C.9 Insubordination: Intentional disobedience or refusal to accept order, assaulting or resisting authority, disrespect or use of insulting or abusive language to a supervisor; C.24 Threatening, intimidating, harassing, coercing or interfering with fellow employees on State Property. N.J.A.C. 4A:2-2.3(a)(2).

The evidence presented by the appointing authority in this matter is that a stick figure drawing, which was drawn by the appellant, was found by a co-worker in the appellant's state issued van. The stick figure drawing depicts his boss, himself and some other workers as stick figures. The carpenter has a hammer in his hand and the plumber has a plunger in his hand. The boss, who smokes a pipe, is smoking a pipe and has a shirt on that says "super boss." The appellant is depicted coughing from the pipe smoke. There are a number of other stick figures, which are red and smaller in size at the bottom of the picture. There is nothing violent or anything that could be construed as indicating violence in the drawing. The picture was found in the

appellant's state issued van and was covered by a calendar. Although there is no expectation of privacy in a state van, it was not hung in the lunch room, distributed in any way, or intentionally left in plain view. There was also a photograph found in the office which the appellant shares that had eyeglasses drawn on several employees. There is no evidence that appellant drew the eyeglasses.

The charges with potential implications to the evidence presented in this matter are: "conduct unbecoming" or "threatening, intimidating, harassing, coercing or interfering with fellow employees on State Property." Conduct unbecoming a public employee is not defined in the New Jersey Statutes or in the New Jersey Administrative Code. The term has been applied to cover a broad range of behavior and is an "elastic one." Pfitzinger v. Bd. of Tr. PERS, 62 N.J. Super. 589, 609 (Law. Div. 1960). Having reviewed a number of these cases, I conclude that drawing a stick figure drawing and leaving it in your work van does not fall anywhere on the spectrum of conduct unbecoming. With respect to intimidation, threatening, or harassing fellow employees, I conclude that the stick figure does not depict any violence, nor was it left anywhere with the intent to intimidate, harass or threaten, and likewise fails to demonstrate the requisite level of behavior to sustain discipline. Finally, the appointing authority failed to demonstrate by a preponderance of the credible evidence that appellant was responsible for drawing the eyeglasses on the photograph. However, such conduct likewise falls fatally short of demonstrating conduct unbecoming or threatening or intimidating behavior.

Based upon the testimony and findings, I **CONCLUDE** that the respondent has not satisfied its burden of providing that the appellant engaged in conduct which constituted conduct unbecoming, insubordination, intentional disobedience, or refusal to accept order, assaulting or resisting authority, disrespect or use of insulting or abusive language or a supervisor, threatening intimidating, harassing, coercing or interfering with fellow employees on State Property. Applying the law to the facts, I **CONCLUDE** that the respondent has failed to prove any of the foregoing charges by a preponderance of

the credible evidence. Accordingly, I **CONCLUDE** that the discipline and the penalty have not been sustained and must be **REVERSED**.

ORDER

I **ORDER** that the action of the appointing authority in imposing a fifteen day suspension is **REVERSED**.


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 25, 2015

DATE



SARAH G. CROWLEY, ALJ

Date Received at Agency:

March 25, 2015

Date Mailed to Parties:

March 25, 2015

SGC/cb

APPENDIX

WITNESSES

For appellant:

Drake Baranyi

For respondent:

Valisa Leonard

Wilson Bulivant

Jeffrey Tinsman

Thomas Harrison

EXHIBITS

For appellant:

P-1 Final Administrative Action of the Civil Service Commission, issued
December 19, 2012

For respondent:

R-1 Notice of Preliminary Disciplinary Action, dated July 19, 2013

R-2 Special Investigations Division Report, dated March 26, 2013

R-3 Memorandum from Wilson Bulivant to Michelle Ricci, dated
November 28, 2012

R-4 Report of Wilson Bulivant, EICM, dated December 6, 2012

R-5 Report of Jeffrey Tinsman, dated December 6, 2012

R-6 Report of Jeffrey Tinsman to Wilson Bulivant, dated November 15,
2012

R-7 Report of Jeffrey Tinsman to Michelle Ricci, dated November 28,
2012

- R-8 Report of Thomas Harrison, dated November 15, 2012
- R-9 Report of Roy Cobb, dated November 9, 2012
- R-10 NJ DOC HRB 84-17, as Amended – Disciplinary Action Policy
- R-11 Disciplinary History
- R-12 Color Photo of Stick Figure Representation
- R-13a – p Photographs from the scene (16 photographs)