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STATE OF NEW JERSEY

In the Matter of Rodney McMillian
Burlington County,
Department of Corrections

CSC DKT. NO. 2013-3548
OAL DKT. NO. CSV 09391-13

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: **JUN 18 2015**

BW

The appeal of Rodney McMillian, County Correction Officer, Burlington County, Department of Correction, 10 working day suspension, on charges, was heard by Administrative Law Judge Joseph A. Ascione, who rendered his initial decision on June 1, 2015. No exceptions were filed.

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 June 17, 2015, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

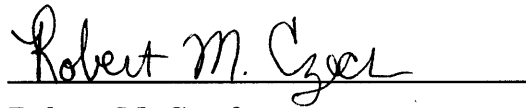
ORDER

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 Rodney McMillian.

Re: Rodney McMillian

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
JUNE 17, 2015

A handwritten signature in cursive script, reading "Robert M. Czech", is written over a horizontal line.

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 09391-13

AGENCY DKT. NO. 2013-3548

**IN THE MATTER OF RODNEY MCMILLIAN,
BURLINGTON COUNTY JAIL.**

Mark W. Catanzaro, Esq., for Rodney McMillian, appellant (Law Offices of Mark Catanzaro, attorneys)

Laurel B. Peltzman, Esq., for Burlington County Jail, respondent (Capehart & Scatchard, attorneys)

Record Closed: April 20, 2015

Decided: June 1, 2015

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

STATEMENT OF THE CASE

On June 20, 2013, appellant, Correction Officer (CO) Rodney McMillian (McMillian), timely appealed his June 11, 2013, ten-day suspension by the Burlington County Jail (BCJ), for failing to qualify with his duty firearm, pursuant to N.J.A.C. 10A:31-8.25 as of December 26, 2012. The June 11, 2013, Final Notice of Disciplinary Action (FNDA) (J-11), sustained charges of violation of N.J.A.C. 4A:2-2.3(a)(1), Incompetency, Inefficiency or Failure to perform Duties; N.J.A.C. 4A:2-2.3(a)(1), Insubordination; N.J.A.C. 4A:2-2.3(a)(3), Inability to Perform Duties; 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 a Policy and Procedure Manual, Section 1158 (J-1). Appellant does not dispute the untimely firearm qualification but emphasizes his completion of the qualification by January 3, 2013; and maintains that he did not intentionally commit the violation. Appellant explains his failure to timely qualify on the unexpected loss of his vehicle due to transmission repairs which he could not afford to pay for at the time. He relied on other co-workers to get him to and from work. He requested the opportunity to attend the firearm qualification class and received verbal confirmation from his sergeant and lieutenant that he would be allowed to attend in November 2012. This did not materialize in November and a suspension prevented him from qualifying earlier in December.

PROCEDURAL HISTORY

On December 28, 2012, a Preliminary Notice of Disciplinary Action (PNDA) (J-10) was issued against McMillian, with similar specifications to the FNDA. On June 11, 2013, the BCJ issued the FNDA. On May 9, 2013, McMillian received his disciplinary hearing on the PNDA. This matter was transmitted to and filed with the Office of Administrative Law on July 2, 2013, by the Civil Service Commission 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 April 20, 2015. Closing arguments occurred at the conclusion of testimony. On April 20, 2015, the record closed.

TESTIMONY

LIEUTENANT MATTHEW LEITH (Leith)

Leith testified to his employment with the BCJ for fifteen years and his present position of Administrative Lieutenant. He acknowledged he did not serve as Administrative Lieutenant at the time of the incident in question. At the time of the incident, he served as the Floor Lieutenant under the Shift Commander.

Leith identified J-1 as the Firearm Qualification Policy 1158. He testified that after taking a firearms class, one has thirty days to complete the range qualification. An

officer could go earlier if requested. A waiver has also been granted by the Warden in certain cases. Requesting documentation by the officer is required in both of these cases. The Firearms Qualification is a job requirement. Leith testified that unless a correction officer was directed to transport an inmate outside of the facility, the correction officer does not carry a firearm inside the facility.

Leith acknowledged that range firearm qualification is required every six-months and that a cost is associated with ammunition for the qualification of the approximate 220 officers on duty at that time. He acknowledged that if officers qualified three times a year instead of two, there would be extra ammunition costs for the BCJ. He could not say that the reason for the Policy 1158 related to the ammunition cost savings. He knew that a remediation class occurred for officer's who were having trouble qualifying but he believed that occurred prior to 2012.

Leith identified J-2 as McMillian's acknowledgement on September 27, 2012, that he received a copy of the Weapons Distribution Policy, Section 1158. Leith testified to working with the appellant for a long time.

Leith identified J-3 as a December 21, 2012, list of those officers that were not qualified as of that date. Leith identified J-4 as the November firearm qualification class and range dates. Leith identified J-5 as the McMillian November work schedule. There were three November class dates available to McMillian. McMillian never requested a waiver, nor did he request to be released from a shift to attend a class. Leith did acknowledge that he could not identify anyone that received a waiver or that the waiver would come to him from McMillian at the time in question. He could only relate that it would be his policy to keep a written request in the file, though he could not say his predecessor did. He could only testify that his review of the file did not reflect any waiver request. Leith had no knowledge of whether any request from McMillian's supervisors from December 4, 2012, to January 3, 2013, required him to have his firearm for duty during the time period in question.

Leith identified J-6 as the December firearm qualification class and range dates. There were three class dates; McMillian attended the December 26, 2012, class date.

See (J-7). McMillian's qualification date had already expired. On January 3, 2013, McMillian attended the range for firearm qualification and passed. See (J-8). J-9 Leith identified as McMillian's work schedule for December 2012. It also reflected that McMillian's firearm qualification expired on December 4, 2012.

Leith identified the above failure to timely complete firearm qualification as a failure to perform duties, insubordination to the written policy, inability to perform duty and neglect of duty. He could not justify conduct unbecoming a public employee from McMillian's failure to timely firearm qualify.

RODNEY McMILLIAN

McMillian testified to employment with the BCJ for thirteen years as a correction officer. He testified to difficulties in November as he had loss the use of his vehicle due to transmission problems and needed to save the money to have the repairs performed. He worked the 7:00 a.m. to 3:15 p.m. shift. He got a ride from a co-worker, Nolan Miller. If Miller did overtime, he would catch a ride with another co-worker. He knew his firearm qualification would expire on December 4, 2012. In early November 2012, he requested Sergeant Nunn to take time for the firearm qualification class and the sergeant informed him the time would be afforded him. Then on the day of the class, McMillian became aware other officers had to go before him and McMillian did not receive permission to attend the class in early November. McMillian again requested to attend the class for the next November date and the sergeant and Lieutenant Ferrier assured him he would be allowed to go to the next class. Then on the day of the next class, the sergeant informed McMillian that staffing required him to remain on the shift. He never went into administration to request leniency or a waiver as he followed the chain of command. He did not know of anyone going to administration for this type of request. He brought his concerns to his sergeant and lieutenant. They knew he needed to qualify. He could not go to another class until after he completed a suspension. He went to the class as soon as he could go and he successfully qualified at the range by January 3, 2013. He never had the intention of not qualifying.

His mom and sister lived in area but both worked and he was not able to borrow their cars. He could not remember when his car broke or when the repairs were completed.

DISCUSSION

Semi-annual firearms requalification is a mandatory job requirement. N.J.A.C. 10A:31-8.25 and BCJ Policy and Procedure, Section 1158. The argument that McMillian did not carry a pistol in the prison and did not receive an order to transport an inmate does not vitiate the requirement that McMillian had to qualify.

McMillian's firearms qualification lapsed from December 4, 2012 through January 3, 2013.

McMillian testified to his unsuccessful attempts to qualify in November 2012. McMillian's attempts were thwarted by his sergeant and lieutenant for reasons that appear legitimate from the limited testimony provided.

On December 26, 2012, McMillian took the firearm class qualification. He could not qualify earlier due to serving a suspension on the days the BCJ offered the course. Leith testified that one could not attend the qualification while suspended.

On December 26, 2012, McMillian did attend the required firearm qualification course. On January 3, 2013, he passed the firearm range qualification.

The BCJ's testimony came from Leith, who was not the Administrative Lieutenant at the time of the incident. His testimony is limited to his current procedures. He could not provide testimony regarding the requests made by McMillian to his sergeant and lieutenant. He testified to a procedure seeking leniency but could not recall any case of a grant of leniency. He testified that he did not see in McMillian's disciplinary file in connection with this hearing a request for leniency.

Leith respectfully answered the direct and cross-examination questions and identified the documents jointly entered into evidence. However, his testimony is limited on the facts of this particular case, as he did not testify to actual knowledge of the events and his knowledge is from the documentary materials provided from the personnel records.

McMillian for the most part respectfully answered the direct and cross-examination questions. He did reveal impatience when the BCJ's counsel repeated questions about his alleged failure to contact administration. He would not think of going to administration for this type of circumstance and had no knowledge of anyone who did. McMillian never went beyond his sergeant or lieutenant in requesting accommodation to attend firearm class qualification. Respondent offered no testimony that there existed a policy or procedure to go beyond the sergeant or lieutenant.

McMillian testified that he did have a mother and a sister in the area, but did not ask for their cars as they both worked. McMillian's testified to an absence of knowledge of when his car was inoperable. He also denied any written documentation to his sergeant or lieutenant of the urgency of his requests to be allowed to qualify. These factors evidence an indifference to protect his interest, or extremely poor judgment in relying on others to protect one's interest.

FINDINGS OF FACT

As a result of the testimony and documentary evidence, I **FIND** the following as **FACTS**:

1. McMillian has been employed with the BCJ since March 29, 2004, in the position of correction's officer.
2. On December 28, 2012, the Weapons Distribution Policy and Procedure, Section 1158, revised on June 1, 2012, required semi-annual firearm requalification.

3. McMillian's firearms qualification lapsed from December 4, 2012 through January 3, 2013.
4. Firearm qualification requires a three-hour class to be attended, first followed by a range qualification. There were three class qualification courses and five range qualifications during each month of November and December 2012. See R-4 and R-6.
5. McMillian made unsuccessful attempts to take the class qualification course in November 2012.
6. McMillian's unsuccessful November attempts to qualify were thwarted by not being afforded the opportunity to attend those classes during regular work hours.
7. McMillian's unsuccessful November attempts to qualify were thwarted by his failure to have available a vehicle to commute to his work location.
8. Respondent suspended McMillian on other unrelated charges on December 11 and December 19, 2012. The suspensions prevented McMillian from attending the two earlier firearm class qualifications in December 2012.
9. On December 26, 2012, McMillian did attend the required firearm class qualification. On January 3, 2013, he passed the firearm range qualification.
10. McMillian made a diligent effort to complete the firearm qualification requirement after the lapse of the qualification.
11. McMillian provided no documentary evidence of the repair date of his vehicle nor any written request to waive the requalification time period.

LEGAL ANALYSIS AND CONCLUSION

Civil service employees's 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 County 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 a given conclusion. Bornstein v. Metropolitan 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).

Respondent has shown that a policy existed requiring semi-annual firearm requalification. Respondent has shown that appellant's firearm qualification lapsed for a period of one month. This is sufficient to met its burden of proof that a violation did

occur. Appellant's actions in immediately qualifying, albeit after the requalification period had lapsed, removes this from an intentional violation of the policy to a careless violation. Appellant has not provided any documentary evidence to support his position that the absence of his vehicle occurred during the time in question or that he took steps to document his attempts to qualify in November 2012. The factual finding that he made attempts to qualify in November is this tribunal's belief of his testimony to that effect, however, it is unsupported by written documentation.

I **CONCLUDE** that respondent has met its proof by a preponderance of the evidence that McMillian failed to qualify, N.J.A.C. 4A:2-2.3(a)(12), specifically, violation of a rule, regulation, policy, procedure, order or administrative decision, Weapon Distribution Procedure, Section 1158.

In regard to the charges of N.J.A.C. 4A:2-2.3(a)(6), Conduct Unbecoming a Public Employee, the respondent's witness could not identify how this charge was violated. As this tribunal found that appellant diligently pursued his firearm qualification, the respondent has not met its burden of proof by a preponderance of the evidence.

I further **CONCLUDE** that respondent has not met its proof by a preponderance of the evidence that McMillian violated N.J.A.C. 4A:2-2.3(a)(6), Conduct Unbecoming a Public Employee.

In regard to the charges of violation of N.J.A.C. 10A:31-8.25; the violation there requires a qualification and requalification but does not set a semi-annual period, the respondent has not met its burden of proof by a preponderance of the evidence that such regulation is separately violated by the violation of Policy and Procedure, Section 1158.

I further **CONCLUDE** that respondent has not met its proof by a preponderance of the evidence that McMillian separately violated N.J.A.C. 10A:31-8.25.

In regard to the charges of N.J.A.C. 4A:2-2.3(a)(1), Insubordination; and N.J.A.C. 4A:2-2.3(a)(3), Inability to Perform Duties; the respondent's witness could only support

insubordination to the written policy and the inability to perform a duty he was never requested to perform. Respondent has not met its burden of proof by a preponderance of the evidence of these charges.

I further **CONCLUDE** that respondent has not met its proof by a preponderance of the evidence that McMillian violated N.J.A.C. 4A:2-2.3(a)(1), Insubordination; and N.J.A.C. 4A:2-2.3(a)(3), Inability to Perform Duties.

In regard to the charges of N.J.A.C. 4A:2-2.3(a)(1), Incompetency, Inefficiency or Failure to perform Duties; and N.J.A.C. 4A:2-2.3(a)(7), Neglect of Duty; these are all encompassed in the failure to timely complete the firearm qualification under Weapon Distribution Procedure, Section 1158.

I further **CONCLUDE** that respondent has met its proof by a preponderance of the evidence that McMillian failed to perform a duty and neglected his duty under N.J.A.C. 4A:2-2.3(a)(1), Incompetency, Inefficiency or Failure to perform Duties; and N.J.A.C. 4A:2-2.3(a)(7), Neglect of Duty.

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, 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.

Turning to McMillian's prior disciplinary record (R-1), it reflects numerous time clock violations during the five years preceding the event charged here. Those prior violations have resulted in an average of thirteen days of suspension each year solely for time clock violations. The low year was 2011, with three days suspension and the high year was nineteen. There is a violation of AVP of five days in 2009, and another weapons qualification violation of five days earlier in 2012. While I considered reducing the suspension due to the prompt requalification, the presence of the earlier weapons qualification violation and the constant and continuing time violations dictates against such a reduction.

McMillian's proposed suspension in this matter is ten days from the FNDA. A reasonable calculation of progressive discipline in the presence of the prior weapons qualification violation, and constant time violations appears to be greater than the ten days sought in the FNDA. However, I will not increase the suspension determined by the respondent.

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

ORDER

For the reasons stated above, I hereby **ORDER** that McMillian violated N.J.A.C. 4A:2-2.3(a)(12), specifically, violation of a rule, regulation, policy, procedure, order or administrative decision, Weapon Distribution Procedure, Section 1158.

I further **ORDER** that McMillian failed to perform a duty and neglected his duty under N.J.A.C. 4A:2-2.3(a)(1), Incompetency, Inefficiency or Failure to perform Duties; and N.J.A.C. 4A:2-2.3(a)(7), Neglect of Duty.

I further **ORDER** that McMillian did not violate N.J.A.C. 10A:31-8.25.

I further **ORDER** that McMillian did not violate N.J.A.C. 4A:2-2.3(a)(6), Conduct Unbecoming a Public Employee; N.J.A.C. 4A:2-2.3(a)(1), Insubordination; and N.J.A.C. 4A:2-2.3(a)(3), Inability to Perform Duties.

I further **ORDER** that McMillian's appeal is **DENIED** except in those areas where the charges were not sustained..


I further **ORDER** that the ten-day suspension against McMillian is **AFFIRMED** in all respects.

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.

June 1, 2015
DATE


JOSEPH A. ASCIONE, ALJ

Date Received at Agency:

June 1, 2015

Date Mailed to Parties:

June 1, 2015

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APPENDIX
LIST OF WITNESSES

For Appellant:

Rodney McMillian

For Respondent:

Matthew Leith, Administrative Lieutenant, Burlington County Jail

LIST OF EXHIBITS

Joint

- J-1 Weapons Policy
- J-2 Acknowledgement of Policy
- J-3 Memo, dated 12/21/12 - Not Qualified
- J-4 November 2012 Class/Range Schedule
- J-5 McMillian November Schedule
- J-6 December 2012 Class/Range Schedule
- J-7 Class Sign-In Sheet, dated 12/26/12
- J-8 Range Sign-In Sheet, dated 1/3/13
- J-9 McMillian December Schedule
- J-10 PNDA, dated 12/28/12
- J-11 FNDA, dated 6/11/13

For Appellant:

None

For Respondent:

- R-1 McMillian Disciplinary History