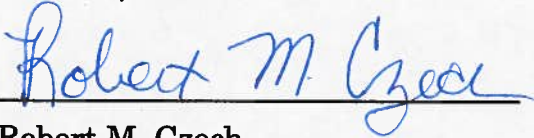


Re: Robin Toliver

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 3, 2015

A handwritten signature in blue ink that reads "Robert M. Czech". The signature is written in a cursive style and is positioned above 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. NOS. CSV 9493-14 and
CSV 9494-14

AGENCY DKT. NOS. 2015-249 and
2015-250

**IN THE MATTER OF ROBIN
TOLIVER, MERCER COUNTY
DEPARTMENT OF PUBLIC SAFETY.**

David B. Beckett, Esq., for appellant (Law Offices of David Beckett, attorneys)

Kristina Chubenko, Assistant County Counsel, for respondent (Arthur R. Sypek,
Jr., County Counsel)

Record Closed: March 25, 2015

Decided: May 11, 2015

BEFORE JOHN S. KENNEDY, ALJ:

STATEMENT OF THE CASE

Respondent, Mercer County Department of Public Safety (hereinafter Appointing Authority), suspended appellant, Robin Toliver, for a total of twenty-five days. The Appointing Authority alleges that appellant, a corrections officer, reported late for her scheduled tour of duty on December 9, 2013 and April 16, 2014, and that suspensions for a period of ten days and fifteen days, respectively, were the appropriate penalty.

Appellant was charged for this offense with violations of N.J.A.C. 4A:2-2.3(a)(4), Chronic or excessive absenteeism or lateness; and N.J.A.C. 4A:2-2.3(a)(11), Other sufficient cause (J-1 and J-2).

PROCEDURAL HISTORY

On December 24, 2013, the Appointing Authority issued a Preliminary Notice of Disciplinary Action setting forth the charges and specifications made against appellant for the December 9, 2013 lateness. On April 23, 2014, the Appointing Authority issued a Preliminary Notice of Disciplinary Action setting forth the charges and specifications made against appellant for the April 16, 2014 lateness. After a departmental hearing on June 12, 2014, the Appointing Authority issued two Final Notices of Disciplinary Action (J-1 and J-2) on July 10, 2014, sustaining the charges in the Preliminary Notices and suspending appellant from employment for a total of twenty-five days. Appellant appealed, and two separate matters were filed at the Office of Administrative Law on July 25, 2014, for hearing as contested cases pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matters were heard together on March 25, 2015, and at the conclusion of the hearing, the record closed.

FACTUAL DISCUSSION

Mike Kownacki is a Lieutenant at the Mercer County Correction Center (MCCC). He has been employed with the Appointing Authority for eighteen years. On December 9, 2013, he was the shift commander for the "A-tour" at the Correction Center. The A-tour is the overnight shift starting at 11:00 pm and ending at 7:00 am. Appellant works on the transportation tour and her shift starts at 6:00 am and ends at 2:00 pm. MCCC uses an automated timekeeping system called Kronos. The Kronos system records an employee's start time for payroll. When an employee is late on either A-tour or the transportation tour, they are required to fill out a late slip which gets time stamped and signed by Lt. Kownacki as shift commander. Late slips are required unless Lt. Kownacki is directed by either the warden or the captain not to issue late slips. Lt. Kownacki did not sign a late slip and does not recall Toliver being late on December 9, 2013. No instructions were given by either the warden or the captain not to issue late

slips. According to the Kronos records, appellant signed in at 6:06 am on December 9, 2013.

MCCC was experiencing wintry weather conditions on December 9, 2013. Lt. Kownacki prepared a tour report which was given to the warden at 6:03. The ramp at MCCC was salted at the end of the prior tour on December 8, 2013 due to icing and the parking lot was cleared at 3:00 am on December 9, 2013 (R-1). Lt. Kownacki does not recall icy conditions on the road when he left his tour.

On April 16, 2014, appellant signed in for her tour at 6:13 am. She was provided a late slip which was signed by both appellant and Lt. Kownacki (R-2). No reason for the lateness is provided on the late slip (R-2). Appellant signed the late slip in front of Kownacki on April 16, 2014. No overtime or shift adjustment was necessary on either December 9, 2013 or April 16, 2014 as a result of appellant's lateness.

Richard Bearden next testified on behalf of the Appointing Authority. He is the captain assigned to MCCC and has been employed since 1990. He assists the warden and administers most discipline at MCCC. Captain Bearden drafted the original charges against appellant after receiving Kronos printouts from the personnel department (R-4 and R-5). MCCC has four Kronos sign in stations, two outside the master control station and two inside. He was not provided a late slip for December 9, 2013, but did review the late slip prepared for the April 16, 2014 lateness. Based on MCCC Standards and Operating Procedures (SOP) 136, a Corrections Officer is considered late if they fail to scan in with the Kronos system at the beginning of their scheduled shift or if they scan in after the start of their assigned shift (R-5). SOP 136 went into effect on August 28, 2009 and provides a step system for subsequent lateness (R-6, p. 2). The MCCC table of offenses and penalties was amended on August 1, 2013 (R-9). SOP 136 also contains a six-month reckoning period wherein if an employee remains infraction free they will be placed back one step. Since appellant signed in after the start of her assigned shift on both December 9, 2013 and April 16, 2014, she was disciplined pursuant to SOP 136 and the revised table of offenses and penalties. No investigation was conducted into either lateness. Captain Bearden relied

on the Kronos printouts and the April 16, 2014 late slips when determining if a violation of SOP 136 occurred.

On April 25, 2013, appellant entered into and signed a Settlement Agreement and General Release (settlement agreement) related to a number of previous disciplinary charges for lateness (R-8). Based on the terms of the settlement agreement, appellant was placed on Step 4 of the MCCC table of offenses and penalties on June 4, 2013 and was subject to the reckoning period specified in SOP 136 (R-8, p. 1). In 2013, MCCC was in discussions with the Union for the corrections officers to change the reckoning period in SOP 136 to three months (A-3). To Captain Bearden's knowledge, SOP 136 has not been revised as those discussions were never reduced to writing. Had the reckoning period been revised appellant would have been on Step 2 on December 9, 2013 and received less penalty for both the December 9, 2013 and the April 16, 2014 infractions.

Robin Toliver, appellant, next testified on her own behalf. She has been a corrections officer for twenty-two years and is currently on the transportation detail at MCCC. Her shift starts at 6:00 am and her responsibilities include providing breakfast to those inmates designated for transport and escorting them to the courthouse. When she signed the settlement agreement she was under the impression that the SOP 136 reckoning period would be decreased to three months. She was told not to worry about the reckoning period provision in the settlement agreement because the union president was confident that it was going to be changed. She did not ask for the language in the settlement agreement to be changed. She is not on the union board and does not attend negotiation meetings. She acknowledges that she was late on December 9, 2013 and April 16, 2014.

On December 9, 2013, she was late arriving to work due to the weather conditions. She has a fear of black ice resulting from an automobile accident she had in 2009 going to work in which her car was totaled. She lives thirty miles away from MCCC and did not realize the roads would be icy when she left her home. She did not fill out a late slip because she was not given one when she signed in. Her transportation duties were not delayed as a result of her lateness. Prior to December 9,

2013, she had not been late since December 2012 and was making an effort to arrive to work early and abide by the terms of the settlement agreement.

On April 16, 2014, she was late because of foggy conditions and the visibility on the road was reduced. When she arrived at MCCC she spoke to Lt. Kownacki and explained to him why she was late. He gave her a late slip which she filled out and signed. She forgot to place the reason for her lateness on the slip but she verbally explained the reason to him. Her transportation duties were not delayed as a result of her lateness on April 16, 2014.

FINDINGS OF FACT

After carefully reviewing the exhibits and documentary evidence presented numerous times during the hearing, and after having had the opportunity to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following to be the relevant and credible **FACTS** in this matter:

Appellant works on the transportation tour and her shift starts at 6:00 am and ends at 2:00 pm. Appellant signed in at 6:06 am on December 9, 2013. On April 16, 2014, appellant signed in for her tour at 6:13 am. No overtime or shift adjustment was necessary on either December 9, 2013 or April 16, 2014 as a result of appellant's lateness. SOP 136 went into effect on August 28, 2009 and provides a step system for subsequent lateness. The MCCC table of offenses and penalties was amended on August 1, 2013. SOP 136 also contains a six-month reckoning period wherein if an employee remains infraction free they will be placed back one step. On April 25, 2013, appellant entered into and signed a Settlement Agreement and General Release related to a number of previous disciplinary charges for lateness. Based on the terms of the settlement agreement, appellant was placed on Step 4 of the MCCC table of offenses and penalties on June 4, 2013 and was subject to the reckoning period specified in SOP 136. In 2013, MCCC was in discussions with the Union for the corrections officers to change the reckoning period in SOP 136 to three months. SOP 136 has not been revised as those discussions were never reduced to writing.

LEGAL ANALYSIS AND CONCLUSIONS

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

The Appointing Authority shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Appellant was charged with "Chronic or excessive absenteeism or lateness." N.J.A.C. 4A:2-2.3(a)(4). Conduct that occurs over a period of time, or frequently recurs, is considered "chronic," and may be the basis of discipline or dismissal. N.J.A.C. 4A:2-2.3(a)(4). "Just cause for dismissal can be found in habitual tardiness or similar chronic conduct." West New York v. Bock, 38 N.J. 500, 522 (1962). While a single instance may not be sufficient, "numerous occurrences over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty." Ibid.

Appellant's status as a corrections officer subjects her to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n,

115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We can take judicial notice that such facilities, if not properly operated, have a capacity to become "tinderboxes."

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

I **CONCLUDE** that appellant's behavior amounted to chronic or excessive absenteeism when viewed in light of the terms of the Settlement Agreement and General Release. She demonstrated a pattern of lateness that placed her on Step 4 of the MCCC table of offenses and penalties on June 4, 2013. She was late on two separate occasions after entering into the settlement agreement and should be bound by the terms of that agreement. Appellant's conduct was such that it could adversely affect the morale or efficiency of a governmental unit or destroy public respect in the delivery of governmental services. Therefore, I **CONCLUDE**, that the appointing Authority has met its burden of proof on this issue for both CSV 9493-14 and CSV9494-14.

Appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(11), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Appellant's conduct was such that she violated this standard of good behavior. As such, I **CONCLUDE** that the Appointing Authority has met its burden of proof on this issue for both CSV 9493-14 and CSV 9494-14.

PENALTY

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

For her actions arising out of this incident, appellant has been found to have violated N.J.A.C. 4A:2-2.3(a)(4), "Chronic or excessive absenteeism or lateness" and N.J.A.C. 4A:2-2.3(a)(11), "Other sufficient cause." Appellant received a ten-day suspension relating to the December 9, 2013 lateness and a fifteen-day suspension relating to the April 16, 2014 lateness. The Appointing Authority provided appellant's signed Settlement Agreement and General Release related to a number of previous disciplinary charges for lateness. Based on the terms of the settlement agreement, appellant was placed on Step 4 of the MCCC table of offenses and penalties on June 4, 2013 and was subject to the six-month reckoning period specified in SOP 136. After having considered all of the proofs offered in this matter, and the impact upon the institution regarding the behavior by appellant herein, and after having given due deference to the impact of and the role to be considered by and relative to progressive discipline, I **CONCLUDE** that appellant's violations are significant enough to warrant a penalty, which, in part, is meant to impress upon her, as well as others, the seriousness of any further infractions by her in that regard. Therefore, I **CONCLUDE** that the imposition of both the ten-day suspension attributable to CSV 9494-14 and the fifteen-day suspension attributable to CSV 9493-14 were appropriate penalties and consistent with the penalties specified in SOP 136.

DISPOSITION

I **CONCLUDE** that the Appointing Authority has sustained its burden of proof as to the charge of violation of N.J.A.C. 4A:2-2.3(a)(4), "Chronic or excessive absenteeism or lateness," and N.J.A.C. 4A:2-2.3(a)(11), "Other sufficient cause."

Accordingly, I **ORDER** that the action of the Appointing Authority is **AFFIRMED**. Appellant will receive a ten-day suspension attributable to the CSV 9494-14 and a fifteen-day suspension attributable to CSV 9493-14.

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.

May 11, 2015
DATE



JOHN S. KENNEDY, ALJ

Date Received at Agency:

May 11, 2015

Date Mailed to Parties:

May 11, 2015

cmo

APPENDIX
LIST OF WITNESSES

For Appellant:

Robin Toliver, Appellant

For Respondent:

Lt. Mike Kownacki
Captain Richard Bearden

LIST OF EXHIBITS

Joint:

- J-1 Final Notice of Disciplinary Action regarding 12/9/13 lateness
- J-2 Final Notice of Disciplinary Action regarding 4/16/14 lateness

For Appellant:

- A-1 12/9/13 B-Tour log
- A-2 7/23/13 emails
- A-3 10/1/13 emails

For Respondent:

- R-1 12/9/13 A-Tour log
- R-2 4/16/14 Late Slip
- R-3 4/16/14 A-Tour log
- R-4 12/9/13 Kronos data
- R-5 4/16/14 Kronos data
- R-6 SOP 136: lateness, Effective Date: 8/28/09

- R-7 SOP 137: Kronos Timekeeping System, Effective Date 8/28/09
- R-8 Settlement Agreement and General Release Signed 4/25/13
- R-9 Correction Center table of offenses and Penalties, Effective Date 8/1/13