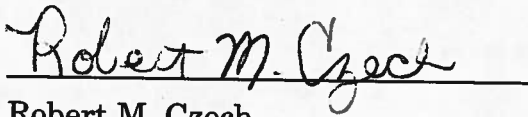


Re: Marc Capobianco

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



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. CSR 14777-14

AGENCY DKT. NO. N/A

**IN THE MATTER OF MARC CAPOBIANCO,
EAST JERSEY STATE PRISON.**

Jennifer Meyer-Mahoney, Esq., for Appellant

**Steven Hahn, Esq., for Respondent, Deputy Attorney General (John J.
Hoffman, Attorney General of New Jersey)**

Record Closed: January 23, 2015

Decided: February 6, 2015

BEFORE KIMBERLY A. MOSS, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Marc Capobianco (Capobianco), appeals his removal by respondent, East Jersey State Prison (East Jersey), on charges of conduct unbecoming an employee, violation of a rule, regulation, policy procedure, order or administrative directive, and other sufficient cause, on charges relating to a his arrest for shoplifting on June 8, 2014. At issue is whether Capobianco engaged in the alleged conduct, and, if so, whether said conduct warrants removal.

On June 17, 2014, East Jersey served Capobianco with a Preliminary Notice of Disciplinary Action. A departmental hearing was held on October 2, 2014. East Jersey served Capobianco with a Final Notice of Disciplinary Action dated October 29, 2014, sustaining charges of conduct unbecoming an employee, violation of a rule, regulation, policy procedure, order or administrative directive, and other sufficient cause.

Capobianco requested a hearing and forwarded simultaneous appeals to the Civil Service Commission and the Office of Administrative Law (OAL). The appeal was filed with the OAL on November 5, 2014. The hearing was held on January 23, 2014, on which date the record closed.

FACTUAL DISCUSSION

Testimony

Pedro Calderon

Pedro Calderon (Calderon) is a loss prevention officer for Shoprite. His job is to prevent shoplifting. He has worked in loss prevention at Shoprite for twenty years. Shoprite in Hackensack has cameras in every aisle as well as the produce and meat sections. The camera's roll all of the time. There is a security office on the second floor of the Hackensack Shoprite that has twenty monitors that are synced with the cameras.

Calderon was working in Shoprite in Hackensack on June 8, 2014. Calderon was walking in the Shoprite when he saw Capobianco and Melissa Guscioria (Guscioria) enter the store. They were in the store before 8:45 p.m. They entered the store with an empty blue bag and a cart. It is uncommon for people to enter Shoprite with empty plastic bags. This led Calderon to become suspicious. They did not have merchandise in the cart when they entered the store as shown at the 20:43:21 time stamp of Exhibit 6 (A DVD from Shoprite showing activity in Shoprite on June 8, 2014). Calderon was on the floor at that time and Guscioria passed by him. Guscioria had a receipt; she grabbed items in the produce section, checked them against the receipt and put the items in a plastic bag. Capobianco also puts an item in the bag. This is

shown at the 20:44:52 time stamp of Exhibit 6. These actions were taped by the Shoprite cameras. Once Calderon believed that they were shoplifting, he went to control the camera to track Gusciora. The video shows Capobianco and Gusciora putting items into empty Shoprite bags. Capobianco is shown putting an item in the blue bag at the 20:45:55 time stamp of Exhibit 6. The blue bag is in the shopping cart. The video next shows Gusciora with a receipt and watermelon on top of an empty Shoprite bag. Gusciora is shown in the dairy aisle looking at a receipt to compare it to an item. Capobianco is on the phone.

Gusciora went to the customer service desk. She wanted to return three bags of merchandise. Capobianco was on the side of the customer service desk at that time. Calderon let the manager know that Capobianco and Gusciora took the items from the shelves and put them in a plastic bag. The manager stated to Calderon that they tried to return the merchandise and were told that they could not. The blue bag that was empty when they entered the store was full when they were at the customer service desk. Calderon grabbed Gusciora's arm. Capobianco stated that he did not need to steal, he was a correction officer. He also stated that if there was a problem, they would leave but Calderon stated they needed to fill out papers. The paperwork is the shoplifting report. Capobianco and Gusciora stated that they wanted to smoke. They left the store then re-entered the store with the police. Capobianco was not cooperative.

Shoplifting charges were filed, but the charges against Capobianco were dropped. Calderon informed the prosecutor that he had evidence of the shoplifting, but he was not asked to produce the evidence. The manager wrote a security report of the incident. Calderon told the police what he saw including the fact that Capobianco and Gusciora were together.

Calderon testified at the departmental hearing of Capobianco. He stated that Capobianco and Gusciora came to the courtesy desk together where he confronted them.

Carri Napolitano

Carri Napolitano (Napolitano) is employed by Shoprite in Hackensack. She has worked at the customer service desk for one year. When a customer returns an item, they need to have either the receipt or a Shoprite card. She recognized Capobianco from the Shoprite video clips. On June 8, 2014, Guscioria came to the customer service desk and handed her three receipts stating that she wanted to return all of the items. She put the Shoprite bag on the counter first. Napolitano and a coworker had to write down all of the items that were being returned. The watermelon in the cart did not match the receipt. Some of the receipts were from a different ShopRite stores. She did not check every item against the receipt because Calderon and the manager came over and stated that Guscioria could not return the items. Calderon grabbed Guscioria, at that point Capobianco came over to the desk and identified himself as a correction officer. Prior to this Capobianco was near the customer service desk next to the ATM machine. You can see the customer service desk from the ATM. He stated if there was a problem they would leave. Guscioria asked for the receipts back but Napolitano gave the receipts to the bookkeeper.

Napolitano spoke to the police. She had a heated exchange with Guscioria and Capobianco in the security room. The police told her that she could leave. Guscioria wanted to return all of the items. Guscioria and Capobianco later stated that they only wanted to return some items. They changed their story.

Officer Gregory Kiselow

Officer Gregory Kiselow is a patrol officer with the Hackensack Police Department. On June 8, 2014, he was sent to the Shoprite regarding a shoplifting complaint. When he arrived, he was flagged down by an employee and told that the suspect was leaving. He stopped Guscioria. She told him that Capobianco was in the car. He spoke to both of them. Capobianco told him that they were attempting to exchange items and he was assaulted. He also stated that he was on the job and an officer. He entered the Shoprite with Capobianco and Guscioria. They went to the security office. Calderon and another employee were also in the security office.

Kiselow spoke to Calderon, who gave his version of events. He was not shown the tape of the incident. Capobianco and Gusciora were arrested and charged with shoplifting. Capobianco stated that it was all a misunderstanding.

Terrance Smith

Terrance Smith (Smith) is a special investigator for the New Jersey Department of Corrections (DOC). He is a principal investigator at East Jersey. On June 13, 2014, he became aware that Capobianco was involved in a June 8, 2014, shoplifting incident when he received a call from Detective Antista inquiring as to whether Capobianco was a correction officer. This was his first notification of Capobianco's arrest. He received the police report. He attempted to get a copy of the tape of the incident but could not. Smith did not interview Capobianco. He contacted Lieutenant Richard Salert (Salert) to determine if Capobianco reported the arrest. If an officer is arrested when he is off duty, he can report the arrest to the shift commander. Smith wrote his report on August 13, 2014. At that time he did not receive any information stating that Capobianco reported the arrest.

Richard Salert

Salert is the administrative lieutenant at East Jersey State Prison. His duties include discipline and attendance. He handles personal misconduct cases. He knows Capobianco as a wing officer at East Jersey State Prison.

The DOC Rules and Regulations for performance and personal conduct for law enforcement personnel are applicable while on or off duty, twenty four hours a day. An officer has to follow the laws of New Jersey. When an officer is arrested he has to call the shift commander and state that he was arrested or issued a summons. The officer has forty-eight hours to convey the information regarding the arrest in written form. Capobianco did not report his June 8, 2014, arrest to East Jersey State Prison. An officer cannot act in a way that discredits himself or act in a way that violates the public trust. Capobianco violated the public trust by attempting to defraud Shoprite and not reporting that a theft was taking place.

Salert does not have a say in what penalties are assessed. Discipline is determined by the conduct of the officer, not whether the charges against him were dismissed. The video was not shown at the departmental hearing.

Capobianco went out on medical leave in January 2014. Capobianco's work history reflects one commendation and a reprimand for an improper sick call.

Melissa Gusciora

Gusciora has known Capobianco since they were in high school. They began dating in the spring of 2014. They are not presently dating. On June 8, 2014, she and Capobianco went to Shoprite in Hackensack to return items that her uncle gave to her. The items were in a blue plastic bag, which she put into a cart. The bag was full when she entered the store. She had three receipts. She also had empty Shoprite bags in the cart when she entered the store. She did not go to the customer service desk upon entering to return the items. She wanted to exchange items that she had marked on the receipt. The items in the blue bag were circled on the receipt. The items that were put in the Shoprite bags were the items that she wanted to exchange for the items in the blue bag. Gusciora uses the words return and exchange interchangeably. There was also a Shoprite bag with items that she was going to purchase. She went to the customer service desk to check out. She placed two bags on the counter. She stated that she wanted to exchange items. She gave the customer service representative the receipts. At that time she was grabbed by Calderon. She yelled "Get your hands off me," and Capobianco came over to her. She asked for the receipts back but was refused. She and Capobianco went outside of Shoprite to smoke with the permission of the Shoprite manager. When the police arrived Gusciora and Capobianco explained to the police what happened and re-entered Shoprite.

Gusciora was arrested and charged with shoplifting all of the items. The charges against Capobianco were dropped before her court date. She plead guilty to violation a municipal ordinance because she did not want to miss any time from work.

She was told that the plea was not an admission of guilt and was fined. Capobianco loaned her the money to pay the fine.

Marc Capobianco

Capobianco was employed by DOC as a correction officer at East Jersey for five and a half years. While working at East Jersey he received one commendation and one reprimand. On June 8, 2014, he had been on disability leave from East Jersey for approximately five months for depression. On that date he accompanied his then girlfriend, Gusciora, to Shoprite to return items that were purchased by Gusciora's uncle. She had receipts. Once in the store he pushed the cart and Gusciora was looking at items to see what she could get for the returned items. He did not go to the customer service desk with her, he was on his phone. He heard her yell and went to see what was going on. He thought Gusciora was being assaulted. He saw her with Calderon and told Calderon that he was a correction officer.

The police arrived three to seven minutes later. He spoke to the police. The police thought that the whole thing was a misunderstanding but Shoprite pressed the shoplifting charges. He was arrested and charged with shoplifting. The charges against him were later dismissed. He provided East Jersey with the notice of disposition on July 31, 2014.

Capobianco did not inform East Jersey when he was arrested. He was unsure of what to do. He consulted an attorney, who told him to wait until after the first court date to inform East Jersey of his arrest. Capobianco is not familiar with all of the DOC policies. He is familiar with the rules and regulations manual. He did not know that he had to report his arrest within forty-eight hours. Capobianco was provided with the policy regarding reporting if you are arrested or summoned. He did not consult with a PBA representative regarding his arrest.

The DVD from Shoprite Exhibit 6 at the 20:45:55 time stamp shows him putting something into the cart. He did not put an object in the blue bag.

FINDINGS OF FACT

In light of the contradictory testimony presented by respondent's witnesses and appellant's witnesses, the resolution of the charges against Capobianco requires that I make credibility determinations with regard to the critical facts. The choice of accepting or rejecting the witness's 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 experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 60 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's 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 (9th Cir. 1963). A fact finder "is free to weigh the evidence and to reject the testimony of a witness even though not 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. 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 observe the demeanor of the witnesses, I **FIND** Calderon, Napolitano, Smith, and Kiselow to be credible. Calderon admitted that his testimony at the departmental hearing was not entirely consistent with his testimony at this hearing. However his testimony was consistent with what the tape showed. He believed that shoplifting was taking place and had the cameras follow Guscioria. Napolitano clearly and concisely testified. She stated the policy Shoprite uses when items are returned. She admitted that the conversation in the security room between her, Guscioria, and Capobianco became heated. Kiselow stated that Calderon and another employee of Shoprite were in the security room with Guscioria and Capobianco. The fact that Kiselow did not remember who the other employee was does not lessen Napolitano's credibility. The testimony of Kiselow and Smith was credible it was clear and truthful.

I **FIND** Guscioria not to be credible. She stated that she went to Shoprite to return items, but she did not immediately return the items. She checked items on the shelves of Shoprite with the receipts she brought to Shoprite then put the items in a bag in her cart. She was charged with shoplifting. She pled to the violation of a municipal ordinance but stated that she did not admit guilt. There was a watermelon in her cart that did not correspond to the receipt. She stated that the blue bag was full when she entered the Shoprite, but Calderon states that she walked by him and he saw that the blue bag was empty. Her explanation of why she put items she into the Shoprite bags that were in the cart while she was shopping was not believable.

I also **FIND** Capobianco not to be credible. He stated that he did not know that officers had to report when they have been arrested, yet he received the DOC policy that states officers must report when they have been arrested. In addition, he contacted an attorney because he was concerned about reporting his arrest. Capobianco is seen on the tape looking at the receipts with Guscioria. He is also seen adjusting a bag in the cart and putting an item from the shelf in the blue bag, which both he and Guscioria stated only contained items that they brought to Shoprite to be returned.

Having reviewed the testimony and evidence and credibility of the witnesses, I make the following additional **FINDINGS of FACTS**.

Capobianco was employed by DOC as a correction officer at East Jersey for five and a half years. In January 2014 he was placed on disability for severe depression. On June 8, 2014, he was still on disability leave. On June 8, 2014, Capobianco and Guscioria, his then-girlfriend, enter Shoprite in Hackensack with a shopping cart, a blue bag, three receipts, and Shoprite bags. The blue bag was not full when they entered the store. They proceeded to the produce area where they both looked at the receipts they brought into the store. Guscioria would check the receipt before putting an item in a bag in the cart. Capobianco pushed the cart. Capobianco put an item into the blue bag in the cart and adjusted the bags in the cart. Guscioria went to the customer service desk and stated that she wanted to return all of the items in the bags. She handed Napolitano the receipts. Calderon grabbed her arm and stated that she could not return the items. As Guscioria was at the customer service desk, Capobianco was

near the ATM machine that is close to the customer service desk. Once Calderon grabbed Gusciora, Capobianco appeared at the customer service desk stating that he was an officer. Capobianco and Gusciora left the Shoprite to smoke. When Kiselow arrived they re-entered Shoprite with him. They told Kiselow that they were returning items. Capobianco and Gusciora were taken to the security office. Calderon and Napolitano were also in the security office. Gusciora and Capobianco were charged with shoplifting. The shoplifting charges against Capobianco were dismissed. Gusciora pled to violation of a municipal ordinance and was fined. Capobianco loaned her the money to pay the fine.

The DOC Law Enforcement Personnel Rules and Regulations, article III section 3, states "No officer shall act or behave either in an official or private capacity to the officer's discredit, or the discredit of the department." DOC Human Resources Bulletin 84-19 states "Employees who are summoned, arrested or incarcerated as a result of a crime or offense as defined by N.J.S.A. 2C Criminal Justice Code of New Jersey must advise their supervisor as soon as possible, but not more than forty-eight hours from the date of the summons, arrest or incarceration." Capobianco signed acknowledgements that he received the DOC Law Enforcement Personnel Rules and Regulations on March 16, 2012 and DOC Human Resources Bulletin 84-19 on January 5, 2009. Capobianco did not report his arrest to East Jersey or the DOC. He sent the disposition of the case to East Jersey on or about July 31, 2014, more than six weeks after his arrest.

LEGAL ANALYSIS AND CONCLUSION

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the charges of conduct unbecoming a public employee, violation of a rule, regulation, policy, procedure, order or administrative directive and, other sufficient cause are sustained.

The purpose of the Civil Service Act is to remove public employment from political control, partisanship, and personal favoritism, as well as to maintain stability and continuity. Connors v. Bayonne, 36 N.J. Super. 390 (App. Div.), certif. denied, 19 N.J. 362 (1955). The appointing authority has the burden of proof in major disciplinary actions. N.J.A.C. 4A:2-1.4. The standard is by a preponderance of the credible

evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). Major discipline includes removal or fine or suspension for more than five working days. N.J.A.C. 4A:2-2.2. Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee, and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. An employee may be removed for egregious conduct without regard to progressive discipline. In re Carter, 191 N.J. 474 (2007). Otherwise, progressive discipline would apply. W. New York v. Bock, 38 N.J. 500 (1962).

Hearings at the OAL are de novo. Ensslin v. Twp. of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994), certif. denied, 142 N.J. 446 (1995).

“Unbecoming conduct” is broadly defined as any conduct which adversely affects the morale or efficiency of the governmental unit or which has a tendency to destroy public respect and confidences in the delivery of governmental services. The conduct need not 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. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

The conduct that Capobianco engaged in was to assist Guscioria in attempting to shoplift items from Shoprite. The fact that the charges against him were dismissed does not lessen the conduct that he exhibited. He looked at the receipts with her; saw her put items that were listed on the receipts into bags in the cart; put items in bags in the cart; and he adjusted the bags in the cart. He was near her when she went to the customer service desk and stated that she wanted to return **all** of the items. This conduct has a tendency to destroy public respect and confidence in correction officers.

Capobianco violated the DOC Human Resources Bulletin 84-19 by failing to inform East Jersey that he was arrested within forty-eight hours. Capobianco admitted that he did not contact East Jersey within forty-eight hours of his arrest. He signed an acknowledgement stating that he had received Human Resources Bulletin on January 5, 2009.

When determining the appropriate penalty to be imposed, the appointing authority must consider an employee's past record, including reasonably recent commendations and prior disciplinary actions. Bock, supra, 38 N.J. 500. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. 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); N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A: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.

Some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. Carter, supra, 191 N.J. at 484 (citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197-98 (1993)) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense); see also In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who snapped a lighter in front of five-year-old):

. . . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.

Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

In this case the conduct that Capobianco engaged in is shoplifting with Guscioria. This conduct in light of his job as a senior correction officer is severe. The fact that he engaged in shoplifting clearly shows that it is unsuitable for him to continue as a correction officer.

Under the circumstances, major discipline is appropriate; I **CONCLUDE** that the penalty of removal is appropriate.

ORDER

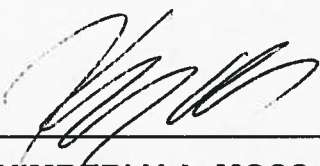
Based on the foregoing findings of fact and applicable law, it is hereby **ORDERED** that the determination of East Jersey that Marc Capobianco be **REMOVED** from employment is **AFFIRMED**.

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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. 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.

2-6-15
DATE



KIMBERLY A. MOSS, ALJ

Date Received at Agency:

2-6-2015

Date Mailed to Parties:

2-12-2015

ljb

WITNESSES

For Appellant:

Melissa Guscioria

For Respondent:

Pedro Calderon

Carrie Napolitano

Gregory Kiselow

Terrance Smith

EXHIBITS

For Appellant:

A-1 Work History of Marc Capobianco

A-2 Notice of Disposition dated July 31, 2014

For Respondent:

R-1 Preliminary Notice of Disciplinary Action dated June 16, 2014

R-2 Final Notice of Disciplinary Action dated October 29, 2014

R-3 Security Reports of Shoprite in Hackensack dated June 8, 2014

R-4 Shoprite of Hackensack receipt dated June 8, 2014

R-5 Shoprite of Hackensack floor plan

R-6 Surveillance video DVD of Shoprite of Hackensack dated June 8, 2014

R-7 Surveillance video DVD of Shoprite of Hackensack dated June 8, 2014

R-8 Hackensack Police Investigation Report dated June 8, 2014

R-9 Fax coversheet from Hackensack Police Department to SID Investigator dated June 13, 2014

R-10 Memorandum to East Jersey Administrator Nogan dated June 16, 2014

R-11 Special Investigations Report dated August 12, 2014

R-12 DOC Law Enforcement Personnel Rules and Regulations

R-13 DOC Human Resources Bulletin 84-19

R-14 DOC Table of Offenses and Penalties

R-15 Capobianco's Acknowledgements of DOC Policies dated April 8, 2009, and
January 5, 2009, and March 16, 2012

R-16 Summons and Plea of Melissa Gusciora