

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018

Deirdre L. Webster Cobb

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Chairperson
Civil Service Commission

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 11113-12

AGENCY DKT. NO. 2013-286

**IN THE MATTER OF SEAN MCGOVERN,
HUDSON COUNTY SHERIFF'S
DEPARTMENT.**

Sean P. McGovern, appellant, pro se

**John J. Collins, Assistant County Counsel, for respondent Hudson County
(Donato J. Battista, County Counsel)**

Record Closed: January 16, 2018

Decided: January 31, 2018

BEFORE MARGARET M. MONACO, ALJ:

STATEMENT OF THE CASE

This matter involves disciplinary charges against appellant Sean McGovern, who, prior to his retirement, was employed as a sergeant with respondent, the Hudson County Sheriff's Department (HCSD). Appellant appeals from a thirty-day suspension predicated on his alleged insubordination.

PROCEDURAL HISTORY

The HCSD issued a Preliminary Notice of Disciplinary Action (PNDA) dated June 28, 2010, informing appellant of the charges of insubordination and conduct unbecoming a public employee issued against him. Specifically, the PNDA states:

On Monday, June 28, 2010, at 11:08 a.m., I, Captain Patrick J. Schifano, contacted Sergeant Sean McGovern, via telephone, and instructed him to leave me a detailed activity regarding a matter under investigation. Sergeant McGovern stated that he would not write the report and indicated that he was leaving work sick because he was stressed and hung up the telephone on me.

After a departmental hearing, the HCSD issued a Final Notice of Disciplinary Action dated July 10, 2012, sustaining the charge of insubordination and providing for appellant's suspension for thirty days. Appellant filed an appeal and the Civil Service Commission transmitted the matter to the Office of Administrative Law, where it was filed for a hearing as a contested case. Following the adjournment of hearing dates at the parties' request, the hearing was held on March 26, 2014. After the conclusion of the hearing, the record remained open for the receipt of a transcript of the hearing and post-hearing submissions. Briefs dated June 30 and July 31, 2017, were filed on behalf of the HCSD and appellant, respectively, and the HCSD submitted a reply brief dated September 5, 2017. On November 13, 2017, I issued an order granting a motion on behalf of appellant's former attorney to be relieved as counsel and affording appellant the opportunity to submit a reply brief. Appellant submitted a reply brief dated January 15, 2018, on which date the record closed.¹

FACTUAL DISCUSSION

At the hearing, the HCSD presented testimony by Captain Patrick Schifano, and appellant testified on his own behalf. Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the

¹ Appellant's submission includes certain facts, and attaches various documents, that were not addressed and/or introduced at the hearing. Inasmuch as this information goes beyond the record in this case, it will not be considered.

demeanor and assess the credibility of the witnesses who testified, I **FIND** the following preliminary **FACTS**.

Appellant was employed by the HCSD from 1997 until his retirement effective September 1, 2010, at which time he held the rank of sergeant. Patrick Schifano (Schifano) is employed as a captain in control of the HCSD's patrol bureau. He has served as a captain for over five years and has been employed by the HCSD for approximately twenty-four years.

During the relevant period, appellant was in charge of supervising certain civilian security guards. Part of appellant's duties included completing attendance sheets or time cards for the security guards under his charge and submitting this documentation to Payroll. Appellant worked under the command of Schifano, who served as appellant's superior officer.

On June 27, 2010, Schifano received a written order from the then undersheriff, Frank Schillari, directing Schifano to obtain a report from appellant regarding his actions for the past eight weeks during which, according to Schillari's memorandum, appellant had not reported to Payroll the work hours of several security guards. (R-2.)

Schifano contacted appellant by telephone at 11:08 a.m. on June 28, 2010. Divergent testimony was offered as to what transpired during that telephone call. On the same day, Schifano authored a report to Schillari regarding his conversation with appellant and drafted the PNDA charging appellant with insubordination and conduct unbecoming a public employee. (R-1; R-3.) Ultimately, the charge of insubordination was sustained and a thirty-day suspension imposed. (R-4.)

The Testimony

Apart from the evidence that forms the basis of the aforesaid findings of fact, a summary of pertinent testimony follows.

Patrick Schifano

Schifano testified that he was directed to contact appellant and obtain a report from him in reference to the eight-week period about which the undersheriff had questions concerning payroll and time cards for the security guards under appellant's command. Schifano contacted appellant by telephone on June 28, 2010, and he ordered appellant to make a report regarding this eight-week period and the time cards that appellant was responsible for. Although Schifano candidly acknowledged that he could not state the exact words that he said, he testified that he informed appellant that he needed a report covering the last eight weeks and recalled saying "time cards." Schifano stated that he had been ordered to get a report from appellant regarding the attendance sheets for the security guards under appellant's purview, and that is what he asked for. He explained that the order was for appellant to explain in a report what happened during the eight-week period regarding missing time sheets for the security guards under appellant's supervision, and he made that clear to appellant. The report did not deal with just one security guard.

Schifano testified that in response to his request, appellant stated that he was stressed, he was going home sick, and he was not doing the report. Schifano described that appellant responded in a "very loud" voice and then hung up the telephone on him. Schifano's conversation with appellant lasted approximately a minute or a minute and a half. Although Schifano acknowledged that he did not recall specifying a time when the report had to be submitted, he articulated his understanding that when a supervisor asks for a report it is to be completed by the end of the day.

Schifano authored a report to the undersheriff on the same day as his conversation with appellant. In the report, Schifano informed the undersheriff that he had contacted appellant and "ordered him to submit a report to [him] detailing the situation with Payroll, in particular his actions over the last 8 weeks and the missing time cards," and appellant "refused to write the report as ordered and said he was going home sick, that he was stressed and hung up on [him] while [he] was still talking to him." (R-3.) Schifano further advised that appellant's actions toward him were "inappropriate and unacceptable" and that he would "be contacting the Internal Affairs unit and filing

charges for the refusal to write the reports as directed and for [appellant's] conduct on that date."

Schifano testified that he made clear to appellant that he needed a report from him and that appellant said that he was not going to do it. Schifano recommended discipline for insubordination because Schifano gave appellant an order and appellant refused to do it. He believed that appellant acted insubordinate because he "blatantly refused to do something" that Schifano had given him an order to do.

Schifano testified that appellant never submitted the requested report to him and, as of his testimony, he still did not have the report. According to Schifano, he offered similar testimony regarding not receiving the report at appellant's disciplinary hearing. He further characterized as "inaccurate" appellant's testimony regarding a conversation with him and Chief Bartucci.

Sean McGovern

Appellant testified that on June 28, 2010, Schifano called him on the telephone and asked for a report regarding an eight-week period and attendance sheets. Appellant described that he had just returned to work after being out sick for seven days. Appellant stated his understanding that the requested report concerned the attendance sheets for one female security guard at the Meadowview Psychiatric Hospital. Appellant did not recall if Schifano mentioned the one security guard, but stated that he knew it involved her attendance sheets because they previously spoke about it. According to appellant, approximately two to three weeks earlier, he had a conversation with Schifano and Captain Bartucci, during which Schifano conveyed that Schillari wanted appellant to write a report about the attendance sheets of the one guard, but it was "all nonsense" and "bulls**t." According to appellant, he was also told that Schillari "wanted to get even" with appellant and wanted him investigated.

Appellant testified that, during his telephone conversation with Schifano, he told Schifano that he was sick and was going home. Appellant described that he had previously told Schifano that he had hives for about three or four weeks due to stress.

According to appellant, he left work on June 28, 2010, because he could not stop scratching; he had only come in to do something and intended on going home; and he went to the doctor the next day. Appellant denied that he spoke in a loud voice and did not believe that he was impolite to Schifano. He denied telling Schifano that he was not doing the report and denied hanging up on him. Appellant testified that Schifano did not convey the immediacy of submitting the report and did not inform him that he wanted the report that day. Appellant acknowledged that he did not tell Schifano when he would write the report.

Appellant testified that he was out of work from June 28 until September 17, 2010. He described conversations with Internal Affairs in July 2010 during which he told the lieutenant that he was going to write the report that day, and that he was later told, when he asked whether he should fax or mail the report, not to worry about it and to bring the report in when he felt better. Appellant testified that he wrote the report at home when he was sick and he submitted the report regarding the one security guard directly to Schifano when he returned to work on September 17, 2010. According to appellant, Schifano admitted that he had received the report during appellant's disciplinary hearing.

Analysis and Additional Findings of Fact

In view of the divergent testimony, it is necessary for me to assess the credibility of the witnesses for the purpose of making factual findings as to the disputed facts. Credibility is the value that a finder of the facts gives to a witness's testimony. It 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). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . 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." Id. at 521–22. A trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

In judging the strength of the evidence and evaluating the demeanor and credibility of the witnesses, I found Schifano to be a forthright and credible witness. He presented candid and persuasive testimony as to the pertinent facts, which was consistent with the report that he authored on the day of the incident. The record is bereft of credible evidence suggesting that he harbored a motive or bias to fabricate his version of the relevant facts. Indeed, appellant described that he had a good relationship with Schifano. Plainly, on balance, appellant has the greatest stake in the outcome of this matter since it involves his discipline. Succinctly stated, a canvas of the totality of the evidence casts doubt on the accuracy, reliability and believability of appellant's version of events. The undersigned found appellant's rendition to be improbable and not "hanging together" with, and discredited and overborne by, the credible testimony of Schifano.

Based upon a review of the testimony and documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following additional pertinent **FACTS**:

During Schifano's telephone conversation with appellant on June 28, 2010, he ordered appellant to submit a report regarding an eight-week period and the attendance sheets of security guards under appellant's supervision. Appellant refused to write the report as ordered and advised that he was stressed and was going home sick. Appellant spoke in a loud voice to Schifano and hung up on him. Schifano did not receive the requested report from appellant.

LEGAL DISCUSSION AND CONCLUSIONS

The Civil Service Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1, et seq. A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. See N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the employee is guilty of the charges brought against him and, if so, the appropriate penalty, if any, that should be imposed. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

In this matter, the HCSD bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to a reasonable probability of truth. Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). 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). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Precisely what is needed to satisfy this burden necessarily must be judged on a case-by-case basis.

An appointing authority may discipline an employee for, among other causes, insubordination. N.J.A.C. 4A:2-2.3(a)(2). Insubordination encompasses an employee's failure or refusal to follow a directive, order or instruction of a supervisor. See Eaddy v. Dep't of Transp., 208 N.J. Super. 156 (App. Div.), certif. granted, 104 N.J. 392, order vacated, appeal dismissed, 105 N.J. 569 (1986); City of Newark v. Massey, 93 N.J. Super. 317, 322 (App. Div. 1967). "It is a fundamental principle of the workplace, especially in a paramilitary organization, that when an employee is given an order by a superior . . . the order will be followed." Osle v. Mid-State Corr. Facility, CSV 6289-01, Merit System Board (April 1, 2003), <<http://njlaw.rutgers.edu/collections/oal/>>. An order need not be in written form to be valid. See Hale v. Dep't of Transp., CSV 6778-02 and

CSV 510-03, Initial Decision (October 9, 2003), adopted, Merit System Board (November 24, 2003), <<http://njlaw.rutgers.edu/collections/oal/>> (employee's refusal to comply with supervisor's verbal direction to turn music down amounted to insubordination). Further, whether a supervisor identified his/her direction as an "order" is irrelevant, and a subordinate's failure to comply with a supervisor's direction constitutes insubordination. See Osle, CSV 6289-01, Merit System Board (April 1, 2003), <<http://njlaw.rutgers.edu/collections/oal/>>. And, "[i]t is not for a public employee to second guess a superior's order and refuse to obey that order because it would result in . . . a result which the subordinate does not concur in." Headen v. E. Jersey State Prison, 94 N.J.A.R.2d (CSV) 623, 627. Rather, "[a] public employee who intentionally disobeys a proper order does so at his or her own risk." Ibid.

Based upon the aforesaid Findings of Fact, I **CONCLUDE** that the HCSD has shouldered its burden of proving, by a preponderance of the credible evidence, that appellant's actions amount to insubordination. In short, appellant was given a direct order by a superior officer and appellant refused to, and failed to, comply with that order. He further spoke in a disrespectful and insubordinate tone and hung up on his superior. Our courts have recognized that a law-enforcement officer is held to a high standard of conduct. See In re Phillips, 117 N.J. 567, 576 (1990); Moorestown Township v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Equally recognized is the importance of maintaining strict discipline in paramilitary settings such as police departments and correctional facilities. See Henry, 81 N.J. at 579; Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); Massey, 93 N.J. Super. 317. In this type of setting, the "[r]efusal to obey orders . . . cannot be tolerated." Rivell, 115 N.J. Super. at 72. Given his lengthy career with the HCSD, appellant should be cognizant of the high standard of conduct expected and the strict rules that must be followed.

The only remaining issue concerns the penalty that should be imposed. It is beyond debate that appellant's past disciplinary record may be considered for guidance in determining the appropriate penalty, and the principle of progressive discipline is applied in this state. See Bock, 38 N.J. at 522. Although an employee's past record may not be considered for purposes of proving the present charge, past misconduct can

be a factor in determining the appropriate penalty for the current misconduct. In re Herrmann, 192 N.J. 19, 29 (2007); In re Carter, 191 N.J. 474, 484 (2007); Bock, 38 N.J. at 522–23. The seriousness of appellant's infraction must also be balanced in the equation of whether a thirty-day suspension or something less is appropriate under the circumstances. See Henry, 81 N.J. at 580.

The parties have stipulated that appellant has no prior disciplinary record to be considered. (J-1.) In other words, appellant's current infraction is an aberration in an otherwise unblemished career. Based upon the totality of the circumstances, I am not persuaded that a thirty-day suspension, as previously imposed, is warranted. I **CONCLUDE** that a ten-day suspension is reasonable and appropriate under the circumstances presented, and that such discipline is consistent with progressive discipline.

ORDER

I **ORDER** that the charge of insubordination be and hereby is **SUSTAINED**. I further **ORDER** that a ten-day suspension is imposed. I further **ORDER** that, inasmuch as appellant had not served the previously imposed suspension prior to his retirement, no back pay or other benefits as may be dictated by N.J.A.C. 4A:2-2.10 are warranted.

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.

January 31, 2018
DATE

Margaret M Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency:

January 31, 2018

Date Mailed to Parties:

jb

Lisa James-Beavers, Dep. Director & ALJ

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

List of Witnesses

For Appellant:

Sean McGovern

For Respondent:

Patrick Schifano

List of Exhibits in Evidence

Joint:

J-1 Stipulation

For Appellant:

None

For Respondent:

- R-1 Preliminary Notice of Disciplinary Action dated June 28, 2010
- R-2 Memorandum from Undersheriff Frank Schillari to Captain Patrick Schifano
- R-3 Memorandum from Captain Patrick Schifano to Undersheriff Frank Schillari dated June 28, 2010
- R-4 Final Notice of Disciplinary Action dated July 10, 2012

