

STATE OF NEW JERSEY

In the Matter of Khalid Nash Essex County, Department of Corrections

CSC DKT. NO. 2018-3550 OAL DKT. NO. CSV 08786-18 FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 24, 2019 BW

The appeal of Khalid Nash, County Correction Officer, Essex County, Department of Corrections, 12. working day suspension, on charges, was heard by Administrative Law Judge Gail M. Cookson, who rendered her initial decision on March 14, 2019. Exceptions and a reply were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

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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 April 24, 2019, 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 Khalid Nash.

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 THE 24^{TH} DAY OF APRIL, 2019

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Chairperson

Civil Service Commission

Inquiries and Correspondence

Christopher S. Myers Director Division of Appeals and Regulatory Affairs Civil Service Commission P. O. Box 312 Trenton, New Jersey 08625-0312

Attachment



INITIAL DECISION

OAL DKT. NO. CSV 08786-18 AGENCY REF. NO. 2018-3550

IN THE MATTER OF KHALID NASH, ESSEX COUNTY DEPARTMENT OF CORRECTIONS.

Eric W. Feinberg, Esq., for appellant Khalid Nash (The Anthony Pope Law Firm, attorneys)

Jill Caffrey, Assistant County Counsel, for respondent Essex County Department of Corrections (Courtney M. Gaccione, County Counsel, attorneys)

Record Closed: February 15, 2019

Decided: March 14, 2019

BEFORE GAIL M. COOKSON, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Khalid Nash (appellant) appeals from the decision of the Essex County Department of Corrections (County) to suspend him from his position as a Correctional Officer for twelve (12) days on charges of other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a) (11). These charges arise as a result of appellant allegedly possessing a cell phone within the secure perimeter of the Essex County Jail on October 21, 2017. Appellant denies the charges.

On January 19, 2018, a Preliminary Notice of Disciplinary Action was filed seeking to suspend appellant from his position for thirty (30) days. The departmental hearing was conducted on March 9, 2018. Thereafter, a Final Notice of Disciplinary Action was issued on May 9, 2018, sustaining the disciplinary charges and suspending appellant for twelve (12) days. The suspension has been served. Appellant appealed that disciplinary action on or about June 6, 2018. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on June 19, 2018, for hearing 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.

The matter was assigned to the undersigned on June 27, 2018. The case was originally scheduled to be heard on November 28, 2018, but was then adjourned at counsel's request. The plenary hearing was held on February 15, 2019, on which date the record closed with oral closing arguments. The undersigned determined that no post-hearing briefs would be needed.

FACTUAL DISCUSSION

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I FIND the following FACTS:

Carlos A. Zapata testified for the respondent on this disciplinary action. Zapata has served in the post of Sergeant for Internal Affairs (IA) since 2015. From 2007 through 2015, he was an Investigator in IA. Prior thereto, Sergeant Zapata was a Corrections Officer starting in 2001 with the County. His responsibilities now include overseeing the investigations into complaints or allegations lodged against officers within the Department of Corrections.

It was brought to Sergeant Zapata's attention through a memorandum from the desk Sergeant, dated October 31, 2017, that appellant was suspected of having aided a visitor getting on the approved list for the inmate she was there to see and for whom she was not yet authorized. This incident took place on Saturday, October 21, 2017.

The female visitor was observed going outside and using her phone after her initial attempt to visit was rejected by the officer in charge. By the time she re-entered the visitor registration area, she had been placed on this inmate's approved list. Sergeant Zapata began his review of that unusual sequence of events by examining the log books, facility videos, and conducting some interviews. At this hearing, Sergeant Zapata explained that the visitor authorization allegation had been removed from the disciplinary action but that this matter concerned the fact that Sergeant Zapata observed, on one of the videotapes he reviewed, appellant using a cell phone in a restricted area at approximately the time that the female visitor was making a phone call from outside.

Sergeant Zapata identified a video of appellant walking down the hallway that is used to escort visitors. On Camera location 258, at 11:37:31, Officer Nash is observed walking away from the camera down the hall toward the elevators such that his back is to the camera. Sergeant Zapata further observed appellant pulling a dark object out of his left pocket, looking at it, and returning it to his pocket. From appellant's body language, as well as the reviewed logs, it seemed apparent to Sergeant Zapata that it was a cell phone that had been retrieved from his pocket. Sergeant Zapata also interviewed appellant who did not deny that he sometimes has his cell phone with him but that he could not recall whether he did on that particular day. Appellant responded "do not recall" to most of the interview questions.

Sergeant Zapata testified that the initial report to IA stated that the female visitor initially came into the facility at 11:40, then went outside, and returned approximately 11:43. While this does not match up with the 11:37 time of the hallway video of appellant, he noted that every camera is not always synced exactly. There are also some areas not within any camera's view. Zapata agreed that there were no other videos containing appellant on them where he was observed using a cell phone, including the camera at the other end of that hallway and in the elevator.

Herbert Hamlin is the Training Officer for the County, a position he has held for three years. He was originally hired as a Corrections Officer in 2012. Officer Hamlin explained that the Training Bureau prepares and presents curriculum as in-service workshops for officers on the policies, procedures and issues that are necessary for the performance of their duties. The office also maintains records on attendance and policy acknowledgments. Officer Hamlin described and sponsored the County policy on contraband, which includes cell phones and other electronic devices, and the Training Attendance and Agenda for the in-service session given on October 16, 2014, which covered the contraband policy. Appellant was present at that training and acknowledged receipt of the policy.

Respondent also presented Sergeant Michael Radice as a witness on appellant's disciplinary history with the County. Sergeant Radice served as a Corrections Officer for ten years before being promoted to a Sergeant where he has served in the Buildings and most recently, as the Disciplinary Sergeant. His testimony served to sponsor the documents concerning a September 2017 disciplinary action against appellant on possession of a cell phone in a restricted area. Therein, appellant received an eight (8) day suspension, from which he did not file an appeal.

Appellant testified on his own behalf. He has been employed with the County as a Correctional Officer since 2001. For the last eight years, he has been assigned to the Visiting Area. In that capacity, appellant's job is predominantly to escort visitors to and from the visiting areas in the various buildings at the complex. Appellant generally described the corridors, the elevator banks and the cameras that are mounted in that hallway. He testified that he escorts an average of eleven groups per day.

Appellant stated that he carries a PBA small notebook calendar with him as a means of recording incidents or other items for his own use. In response to cross-examination and my own questioning, appellant stated that the item in his pocket could also have been a calculator or his keys. Yet, at this particular time, his keys were attached to his belt. Appellant also explained with respect to the dropped allegations concerning the female visitor that he might have left the computer without logging himself out such that another officer could have been the one to change her visitor authorization.

In this case, the issue in contention is purely factual and is premised upon the testimony adduced by both parties, and the videotape of the alleged incident. Thus, it is a matter of credibility for me to determine. For evidence to be credible it must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted). 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). Credibility, or, more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

It is important to note that the County does not have to meet the much higher criminal standard of beyond a reasonable doubt, which I FIND is all that appellant proffered in defense. I FIND that the County has proven by the preponderance of the credible evidence that appellant had a cell phone on his person in a restricted area. From the experienced eye of Sergeant Zapata and my own review of the tape, there is more than just a "belief that the tendered hypothesis is in all human likelihood" true, that is, that the object appellant withdrew from his pocket, looked at, and then replaced was a cell phone. The body language is familiar and telling. Furthermore, I did not find appellant to be very credible with respect to the myriad of possibilities that might have been the object he withdrew from his pocket. For example, a PBA notepad calendar would be useless without a pen, and his keys were on his belt.

ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to

public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). Governmental employers also have delineated rights and obligations. The Act sets forth that it is State policy to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

"There is no constitutional or statutory right to a government job." <u>State-Operated Sch. Dist. of Newark v. Gaines</u>, 309 N.J. Super. 327, 334 (App. Div. 1998). 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. N.J.S.A. 11A:2-6; 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 <u>de novo</u> hearing are whether the appellant is guilty of the charges brought against her and, if so, the appropriate penalty, if any, that should be imposed. <u>See Henry v. Rahway State Prison</u>, 81 N.J. 571 (1980); <u>W. New York v. Bock</u>, 38 N.J. 500 (1962). In this matter, the County bears the burden of proving the charges against appellant by a preponderance of the credible evidence. <u>See In re Polk</u>, 90 N.J. 550 (1982); <u>Atkinson v. Parsekian</u>, 37 N.J. 143 (1962).

Having found above that the County has proven by the preponderance of the credible evidence that appellant had a cell phone on his person in a restricted area, I must determine the proper penalty or discipline to be assessed. 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. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. See Bock, 38 N.J. at 523-24. 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 the concept of progressive discipline is the nature, number and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the

development of employee potential. In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. <u>Ibid</u>. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. <u>Id</u>. at 522-24. Major discipline may include removal, disciplinary demotion, a fine or suspension no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

In this case, I CONCLUDE that the County supported the imposition of a penalty of a twelve (12) day suspension as reasonable and fair. Appellant had an immediately prior major disciplinary action, also involving possession of a cell phone, on which he received an eight (8) day suspension. Accordingly, and based upon the facts established above at the hearing, I CONCLUDE that the penalty of twelve days is not excessive and does not in any way shock the conscience. The critical policies of the Essex County Department of Corrections with respect to the dangerous issue of cell phones in jail facilities warrants the stance taken herein.

ORDER

Accordingly, it is **ORDERED** that the appeal of Khalid Nash from the disciplinary action and twelve-day working suspension entered in the Final Notice of Disciplinary Action of the Essex County Department of Corrections is hereby **DENIED**. It is further **ORDERED** that the Final Notice of Disciplinary Action shall and the same is hereby **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.

March 14, 2019	Hailm Crokson
DATE	GAIL M. COOKSON, ALJ
Date Received at Agency:	
Date Mailed to Parties:	
id	

APPENDIX

LIST OF WITNESSES

For Appellant:

Khalid Nash

For Respondent:

Carlos A. Zapata

Herbert Hamlin

Michael Radice

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

None.

For Respondent:

- R-1 CD of Video, October 21, 2017, 11:30 14:30
- R-2 Investigation Report, Sgt. Carlos Zapata, dated January 2, 2018
- R-3 Essex County Corrections Policy, Contraband and Search of Inmates/ICE Detainees and Facility, dated September 2, 2014
- R-4 Essex County Department of Corrections, 3rd Quarter In-Service Training and Signed Acknowledgment, dated October 16, 2014
- R-5 Essex County Department of Corrections, 3rd Quarter In-Service Training, Agenda
- R-6 Preliminary Notice of Disciplinary Action, dated September 12, 2017
- R-7 Final Notice of Disciplinary Action, dated January 22, 2018