

In his original February 15, 2022, initial decision, the ALJ recommended dismissing the charges and reversing the removal. Exceptions to that initial decision were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant. In its March 23, 2022, decision remanding the matter back to the OAL, the Commission found that the exceptions filed on behalf of the appointing authority cited to testimony which appeared to be completely contrary to what the ALJ summarized in his initial decision. As such, the Commission returned the matter to the ALJ to expand on his recitation of the testimony in light of the contrary positions presented in the exceptions and further expand on, modify, or change his credibility determinations.

In his April 25, 2022, initial decision, the ALJ painstakingly addressed and reconciled each concern regarding the testimony that was in purported conflict and provided reasonable explanations regarding each. As such, he again found that the charges against the appellant were not sustained and he recommended that the removal be reversed. Upon its *de novo* review of the entire record, including the original and subsequent initial decision, the Commission is satisfied that the ALJ's findings and conclusions based on his assessment of the credible testimony in the record are not arbitrary, capricious or unreasonable. Accordingly, the Commission finds that the reversal of the removal is supported by the credible evidence in the record.

Since the removal has been reversed, the appellant is entitled to be reinstated with mitigated back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10. The appellant is also entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay or counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Frank James. The Commission further orders that the appellant be granted back pay, benefits, and seniority from the first date of separation to the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned, and an affidavit of mitigation shall be submitted by or on behalf of the

appellant to the appointing authority within 30 days of issuance of this decision. The Commission further orders that counsel fees be awarded to the attorney for the appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2-2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay or counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay or counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to R. 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF JUNE, 2022

Deirdre' L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Allison Chris Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 02287-22
AGENCY DKT. NO. 2021-1348
(REMAND OF CSR 03008-21)

**IN THE MATTER OF FRANK JAMES,
ESSEX COUNTY, DEPARTMENT OF
CORRECTIONS.**

Patrick P. Toscano, Jr., Esq., for appellant Frank James

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

Record Closed: March 25, 2022

Decided: April 25, 2022

BEFORE BARRY E. MOSCOWITZ, ALJ:

STATEMENT OF THE CASE

Respondent, the Essex County Department of Corrections (DOC), removed appellant, Frank James, from his position as a correction officer for allegedly giving contraband to an inmate. Should James be removed from his position when a preponderance of the evidence does not exist that he knowingly gave the inmate any

contraband? No. The appointing authority must prove its charges and specifications by a preponderance of the evidence. See Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

PROCEDURAL HISTORY

On March 9, 2020, the DOC served James with a Preliminary Notice of Disciplinary Action. The DOC charged James with incompetency, inefficiency, or failure to perform duties in violation of N.J.A.C. 4A:2-2.3(a)(1); conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7); and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12). That last alleged violation constituted alleged violation of numerous departmental policies and procedures (PS.CLS.001, Counts Control; PS.CUS.006.02, General Housing Unit Post Orders; PS.CUS.046, Contraband and Search of Inmate/ICE Detainee; PS.CUS.006.33, Close Custody Special Housing Unit), as well as numerous departmental rules and regulations (3:1.23, Knowledge of the Law and Regulations; 3:10.5, Truthfulness; 1:2.33, Neglect of Duty; 3:1.1, Standard of Conduct; 3:1.9, Performance of Duty; 3:2.1, Prohibited Activities on Duty; 3:8.8, Control of Contraband; 3:1.34, Reporting Unusual Incidents or Occurrences on Duty).

The notice specified that on January 27, 2020, James entered an unauthorized area and gave an inmate contraband, a USB drive containing movies. In addition, the notice specified that on six dates between January 12, 2020, and January 27, 2020, James failed to conduct facility tours and inmate counts. Likewise, the notice specified that James falsified close-custody observation sheet reports, fraternized with inmates, failed to ensure that doors were properly secured, failed to properly supervise the inmate population's meal service, and abandoned his post for sixteen minutes. Finally, the notice specified that James failed to report the contraband that he seized from an inmate, and that he failed to take the appropriate steps to secure and inventory it. As a result, the DOC suspended James and sought his removal.

James waived his right to a hearing, and on February 26, 2021, the DOC issued a Final Notice of Disciplinary Action, removing James from his position as a correction officer, effective March 9, 2020.

On March 11, 2021, James appealed the determination to the Office of Administrative Law under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On March 22, 2021, James perfected his appeal, and on April 6, 2021, the case was assigned to me for hearing.

On May 24, 2021, I held the hearing; on November 17, 2021, James filed his post-hearing brief; and on January 13, 2022, the DOC filed its post-hearing brief.

On February 15, 2022, I issued my decision. In my decision, I found that the DOC had not proven by a preponderance of the evidence any of the allegations contained in its specifications. The remainder of that section was discussion. Given this finding that the DOC had not proven by a preponderance of the evidence any of the allegations contained in its specifications, I concluded that the DOC had not proven by a preponderance of the evidence any of the charges contained in its Final Notice of Disciplinary Action, and that this case should be dismissed.

On March 25, 2022, the Civil Service Commission remanded the case. In its remand, the Civil Service Commission asks that I address thirteen exceptions that the DOC filed after I issued my decision. The Civil Service Commission also asks that I reconsider my credibility determinations.

DISCUSSION AND FINDINGS OF FACT

The thirteen exceptions are listed as bullet points. I will address each in turn. For the first bullet point, the DOC writes that Tashneke James never indicated that she had no recall of the alleged incident or that she relied solely on the statement she provided. That characterization, however, is an overstatement of what I wrote. To expand my discussion, I determined that Tashneke James had little recall of any specific events beyond what she had written in her statement, testifying nearly exclusively from her written statement, and after assessing her credibility, including her demeanor on the

witness stand, I further determined that I could not rely upon any of the testimony she provided beyond what she had written in her statement. To repeat what I wrote in my initial decision, Tashneke James saw Frank James enter the building on January 27, 2020, and hand the inmate a USB drive, after which Tashneke James contacted another officer, Mark Horst, who confiscated the USB drive from that inmate. Moreover, on cross-examination, Tashneke James admitted that she knew nothing about the circumstances surrounding the USB drive.

To be clear, a USB drive is not contraband. It may contain contraband, but the USB drive itself is not contraband. Inmates are allowed to possess USB drives. More significantly, Frank James never learned what was on the USB drive at issue because he never reviewed it. He did not review it at home because he did not take the USB drive home with him, and he did not review it at work because he did not have the ability to do so.

To remind, the implication from Tashneke James and the DOC was that Frank James had placed movies on the USB drive for the inmate. This was not the case. Frank James had returned the USB drive to the inmate because Frank James no longer believed that the USB drive contained any pornography. The inmate had “bragged” in front of Frank James that the USB drive contained pornography, which is why Frank James confiscated it, but he later understood that the inmate had been “joking” about the USB drive containing pornography, which is why he returned it. While the better course would have been for Frank James to have had the USB drive reviewed before he returned it to the inmate, to ensure that it did not contain any pornography, Frank James did not do so, and I concluded that such an omission did not warrant major discipline, let alone his removal.

For the second bullet point, the DOC writes that Horst never indicated that he had no recall of the alleged incident or that he relied solely on the statement he provided. This too is an overstatement of what I wrote. To expand my discussion, I determined that Horst, like Tashneke James, had little recall of any specific events beyond what he had written in his statement, testifying nearly exclusively from his written statement, and after assessing his credibility, including the limited scope of his participation in the incident, I

determined that I could not rely upon any of the testimony he provided beyond what he had written in his statement. The distinction here is that I did not find Tashneke James's testimony to be trustworthy, whereas I did not find Horst's testimony to be meaningful. To repeat what I wrote in my initial decision, Horst corroborated that Tashneke James told him that she saw Frank James give a USB drive to an inmate, which Horst took from the inmate. During the hearing, Horst added that he reviewed the USB drive and that it contained movies from the theater, not pornography, which is what Frank James had suspected it contained when he confiscated it. To recapitulate, the narrative from Tashneke James and the DOC was that Frank James had placed movies on the USB drive for the inmate when the truth was that Frank James confiscated the USB drive from the inmate because he suspected it contained pornography.

For the third bullet point, the DOC writes that Carlos Matos never indicated that he had no recall of the alleged incident or that he relied solely on the statement he provided. Once again, that characterization is an overstatement of what I wrote. To expand my discussion, I determined that Matos, like Horst, had little recall of any specific events beyond what he had written in his statement, testifying nearly exclusively from his written statement, and after assessing his credibility, including the limited scope of his participation in the incident, I determined that I could not rely upon any of the testimony he provided beyond what he had written in his statement. The distinction once again is that I did not find Tashneke James's testimony to be trustworthy, whereas I did not find Matos's testimony to be meaningful. To repeat what I wrote in my initial decision, Matos merely repeated what Tashneke James and Horst wrote in their statements.

For the fourth bullet point, the DOC writes that I failed to explain how Tashneke James was motivated by self-interest. To expand my discussion, it was my impression that Tashneke James was biased. It was my impression that Tashneke James did not like Frank James—that she had contempt for him. It was also my impression that she was annoyed that Frank James was in “her” area—an area that he was not “authorized” to be in. Moreover, it was my impression that Tashneke James saw Frank James's interaction with the inmate in “her” area on the date in question as an opportunity to cause trouble for Frank James. Evidence of this was the fact that Tashneke James never explored why Frank James was in “her” area in the first place, and cast his handing the

USB drive to the inmate as nefarious—even though inmates are allowed to possess USB drives.

For the fourth, fifth, and sixth bullet points, the DOC writes that I failed to explain how Steve Alese was motivated by self-interest and tasked to achieve a result. To expand my discussion, it was my impression that Alese was tasked to achieve a result because Alese explicitly stated that the warden had tasked him to investigate James. But this is a discussion point. I did not find it as fact. What was more significant was the trustworthiness and reliability of Alese's investigation itself.

As I discussed in my initial decision, Alese was not trained on conducting Internal Affairs investigations, and he was not familiar with the Attorney General Guidelines for Internal Affairs investigations. He did not even interview James during his investigation. Moreover, he had little recall of his investigation beyond what he had written in his report, and like the other witnesses, he testified nearly exclusively from his report. He also came across as diffident on the stand. To me, these circumstances undermined the trustworthiness and reliability of his investigation.

What also undermined the trustworthiness and reliability of Alese's investigation was Alese's investigation of James's previous five shifts and Alese's interpretation of the video surveillance from those dates. For bullet point seven, the DOC writes that the security footage shows that James is not where he reported he was. This is an overstatement. James explained himself at the hearing—something James never had a chance to do during the investigation—including the fact that the timeclocks of the cameras and the timeclocks of the computers did not match—and the fact that the security footage does not capture the entirety of his shift. As such, the evidence does not preponderate that James failed to report where he was.

For bullet point eight, the DOC notes that Frank James testified that certain captains and other supervisors wanted to get rid of him, and then concludes that Tashneke James could not have wanted to get rid of him because she is neither a captain nor a supervisor. This is a nullity. Although Tashneke James is neither a captain nor a supervisor, the DOC cannot presuppose that such a sentiment did not permeate to those

who were not captains or supervisors. Similarly, the DOC leaves out of its exceptions the fact that Alese was tasked with the investigation by a chain of command that included a captain or supervisor. Regardless, this too was a discussion point. I did not find it as fact.

For bullet point nine, Frank James admitted that he did not document the logbook perfectly, and that he was counseled on how to document the logbook better. If the DOC now wants to discipline James for this mistake, long after it had counseled him about it, then that is its prerogative—but it begets the question why it did not do so when it first counseled him. Still, as I wrote in reference to bullet point seven, the evidence does not preponderate that James was not where he reported he was.

For bullet point ten, the DOC repeats Alese's impressions of the video surveillance, suggesting that Alese's impressions should be found as fact, and implies that I should adopt his impressions as my own. I did not accept Alese's impressions in my initial decision, and I do not accept them now. In other words, I am not adopting Alese's lay opinion that James engaged in prolonged or extended conversations with inmates in violation of Rule and Regulation 3:2.1 as a matter of fact or law.

Similarly, for bullet point eleven, the DOC repeats Tashneke James's and Matos's characterization that Frank James was in an "unauthorized" area when he returned the USB drive to the inmate. Whether we characterize Frank James's appearing in the area as unauthorized, the legal question remains whether his appearance in the area was in violation of DOC policy, and if it was, whether Frank James should be disciplined for it. Once again, the evidence does not preponderate that he was in an "unauthorized" area as a matter of fact or law.

For bullet points twelve and thirteen, the DOC writes that James wrote in his statement that "no contraband was found on the drive," and that Alese testified that he reviewed video footage from the entire shift. Yet no inference line is identified. Without such an inference line, these warrants are standalone statements. Accordingly, I cannot make any additional findings of fact or conclusions of law from them.

Given this discussion of the facts, I make no additional findings here and repeat my finding from my initial decision: I **FIND** that the DOC has not proven by a preponderance of the evidence any of the allegations contained in its specifications.

DISCUSSION AND CONCLUSIONS OF LAW

In my initial decision, I discussed the facts and made one ultimate finding. The above discussion was to amplify how I reached that finding. Now that I have done so without finding any additional facts, I repeat my conclusion from my initial decision: I **CONCLUDE** that the DOC has not proven by a preponderance of the evidence any of the charges contained in its Final Notice of Disciplinary Action, and that this case should be **DISMISSED**. While the better course would have been for Frank James to have had the USB drive reviewed to ensure that it did not contain any contraband, such an omission does not warrant major discipline. Above all, it does not warrant his removal.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that James be reinstated to his position of correction officer, that he be **AWARDED** all back pay, seniority, and costs, including all attorney fees associated with this appeal, and that this case against him be **DISMISSED**.

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 case. 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 under N.J.S.A. 40A:14-204.

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.

April 25, 2022

DATE


BARRY E. MOSCOWITZ, ALJ

Date Received at Agency:

April 25, 2022

Date Mailed to Parties:

April 25, 2022

dr