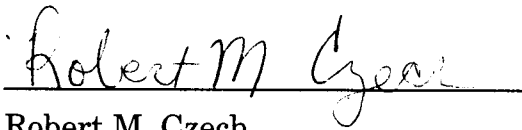


Re: Joshua Peek

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
AUGUST 19, 2015

A handwritten signature in cursive script, reading "Robert M. Czech", is written over 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. NO. CSR 10602-14

AGENCY DKT. NO. N/A

**IN THE MATTER OF JOSHUA PEEK,
SOUTHERN STATE CORRECTIONAL FACILITY.**

Arthur J. Murray, Esq., for appellant, Joshua Peek (Jacobs & Barbone, P.A., attorneys)

Anthony DiLello, Deputy Attorney General, for respondent, Southern State Correctional Facility (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: May 29, 2015

Decided: July 8, 2015

BEFORE **BRUCE M. GORMAN**, ALJ:

STATEMENT OF THE CASE

Appellant appealed respondent's action terminating his employment as a Senior Corrections Officer at Southern State Correctional Facility for conduct unbecoming.

PROCEDURAL HISTORY

Appellant was served with a Preliminary Notice of Disciplinary Action on May 7, 2014. Following a departmental hearing on June 10, 2014, the Department on July 22, 2014, issued a Final Notice of Disciplinary Action, removing him effective July 23, 2014. His appeal was filed at the Office of Administrative Law on August 25, 2014 [N.J.S.A. 40A:14-202d]. Hearing dates were scheduled for December 10, 2014 and December 17, 2014 and were adjourned at the appellant's request. Appellant waived the 180-day requirement on the record. The matter was heard on April 2, 2015, May 5, 2015 and May 11, 2015, and the record closed on May 29, 2015.

FACTUAL SUMMARY

Appellant was terminated from his employment as a Senior Corrections Officer at Southern State Correctional Facility for unbecoming conduct. Specifically, the appellant was charged with undue familiarity with a prisoner named Barry Berbeck (Birkbeck).

Stephen Manera (Manera) testified for the agency. Manera has been a Corrections Officer with the agency for nineteen years. For the past fifteen years, he has been assigned to the Special Investigations Division (SID). He currently holds the title Principal Investigator. At the time of the investigation in question, his title was Senior Investigator. As an investigator, his job was to gather evidence and conduct interviews in support of disciplinary actions against corrections officers for corruption, undue familiarity, and the like.

Manera testified that a confidential informant advised Internal Affairs (IA) that on December 8, 2013, appellant smuggled into the prison tobacco and steroids for inmate Birkbeck. That tip started an investigation of appellant's activities.

Manera interviewed inmate Birkbeck on three or four occasions. Birkbeck admitted to receiving tobacco and magazines from the appellant. The appellant would

smuggle the contraband into the prison under his vest. Birkbeck then sold the tobacco to other inmates. Birkbeck stated his father was to go between who provided the contraband to the appellant. In return for the December 8, 2013 delivery, Birkbeck's father paid \$300 in cash to appellant on December 3, 2013.

Birkbeck admitted to receiving contraband from appellant on numerous occasions in 2013. On each occasion, appellant directly handed the contraband to Birkbeck. Birkbeck sent the money he made from selling the tobacco to his father. His father then banked the money and purchased additional tobacco for appellant to smuggle into the prison. Appellant provided Birkbeck with his home address that the contraband would be delivered there. Appellant requested that the contraband be sent to his home on certain days so that he could be present to receive them without his wife knowing. Birkbeck also told the investigators that his father sent appellant a Wawa gift card for \$100 to show his appreciation for smuggling in the contraband. Additionally, the appellant provided Birkbeck with his telephone number so that his father could contact him. Birkbeck also stated that Senior Corrections Officer Hughes smuggled in contraband on one or two occasions. Birkbeck declined to provide a written statement.

The IA unit interviewed Birkbeck's father, Barry Birkbeck, Sr. (Birkbeck, Sr.) Manera and Wise drove to Birkbeck's Sr.'s house on January 6, 2014 without telling him they were coming. They interviewed Birkbeck Sr. in his garage.

Birkbeck Sr. admitted to sending packages of tobacco and chewing tobacco to [REDACTED] in Bridgeton. He told the investigators that [REDACTED] in Bridgeton was appellant's home. After he sent the packages to appellant's home, Birkbeck Sr. would receive money from his son, which Birkbeck Sr., would use to purchase more tobacco and chewing tobacco. He also purchased and presented to appellant a Wawa gift card.

Birkbeck, Sr. gave the officers a letter dated November 6, 2012 (R-14) which his son had written to him. The letter contained appellant's address and talked about his autistic son and lazy wife. The letter asked Birkbeck Sr. to purchase the \$100 gift card

for appellant to thank him for his help. The letter noted that appellant's daughter and Birkbeck's daughter were the same age.

Birkbeck Sr. would not provide a written statement. Manera reviewed appellant's personnel file and determined that his address was [REDACTED] in Upper Deerfield, New Jersey. Upper Deerfield is a suburb of the City of Bridgeton. Manera also verified that the ages of appellant's daughter and Birkbeck's daughter were the same (R-9).

Manera introduced into evidence Birkbeck's bank statement for his prison trust account (R-8). The account showed four outgoing payments, all to Birkbeck, Sr. The dates and amounts of those payments were: 10/3/2013 - \$299; 10/3/13 - \$149; 10/30/13 - \$299; 12/12/13 - \$300. Manera testified that the amounts going into and out of Birkbeck's account were unusual for a prisoner to accrue. Manera interviewed the appellant on April 29, 2014. That interview was videoed (R-19). Appellant's union representative was present during the interview.

The video was displayed in Court. During the interview, appellant was advised that Birkbeck had been found to possess tobacco. Appellant stated he had no idea how Birkbeck had obtained the tobacco. He denied knowing any of Birkbeck's family members. When asked if he had received packages from Birkbeck's father, appellant stated that he received lots of packages. He did not remember where any of the packages came from. When asked if he remembered a package on December 9 containing five bags of tobacco and a Wawa gift card, appellant shook his head.

Appellant could not identify inmate Guaracci. He continued to state that he did not know what packages he received. He did not know how Birkbeck Sr. could have obtained his address. He denied having any relationship with inmate Birkbeck. He knew nothing about packages.

Appellant stated that he uses many Wawa gift cards. He receives them for his birthday and for Christmas in all different denominations. He had no specific recollection of where his Wawa gift cards came from.

Appellant denied discussing personal information with Birkbeck, although he admitted to having casual conversations with him. He was presented with the letter Birkbeck wrote to his father (R-14). He could not explain how the letter contained his address or information about his daughter.

Appellant stated that he never saw a package with five containers of tobacco. He did not know how Birkbeck obtained his address, although he speculated that Birkbeck could have Googled the address. He admitted that when mail arrived at his home, he brought it into the house. But he denied ever speaking to Birkbeck Sr., either in person, or on the phone. He noted that a lot of people call his house, so it was possible Birkbeck Sr. called and he answered the phone, but he never knowingly spoke with Birkbeck, Sr. He never deliberately called Birkbeck Sr. He did not know Birkbeck Sr.'s phone number.

After receiving the information from the confidential informant that appellant was smuggling tobacco in for Birkbeck, Manera listened to the recordings of Birkbeck's phone calls.

On May 19, 2013 Birkbeck told his father to send "my friend the guard" \$100 on Tuesday or Wednesday.

On May 26, 2013 Birkbeck Sr. told Birkbeck he had been working Bridgeton and had driven past "CO's house".

On November 8, 2013, Birkbeck spoke to Birkbeck Sr. telephonically. Birkbeck Sr. said he had the stuff all packed up. Birkbeck asked how much and Birkbeck Sr. said \$150.

On November 14, 2013 Birkbeck spoke with Birkbeck Sr. Birkbeck Sr. stated he sent out the material on Tuesday with \$150 for the recipient.

On November 24, 2013 Birkbeck asked Birkbeck Sr. to pick up a couple of more things and to send appellant \$300.

On November 30, 2013 Birkbeck Sr. said he bought the materials and sent the \$300.

Manera interviewed Senior Corrections Officer Nicole Crist (Crist). Crist stated that she had heard rumors that appellant and Hughes were smuggling contraband into the prison, but had seen no proof that this was true. Crist stated that during searches she found empty cans of chewing tobacco in various inmates' lockers.

On cross-examination, Manera stated he was not familiar with a "target letter". When asked if appellant had received a target letter, he stated, "He guesses not".

On cross-examination, Manera agreed that corrections officers do not have to enter the prison through a specific entrance. Not every entrance is protected by a guard. As far as he was aware, only the front door was protected by a metal detector. The corrections officer's vests were not processed through an ion reader. The officers operating Southern State's ion reader were not a target of the investigation.

Manera was not aware that the correction officer uniforms had recently been changed. In the past, the vest was worn outside the shirt; now the vest is worn under the shirt.

Manera agreed that appellant was never indicted. The Cumberland County Prosecutor's Office did not investigate the case.

Manera did not know if Southern State Correctional facility had surveillance cameras. If the facility had those cameras, he did not check them.

Manera never attempted to track the Wawa gift card to determine if Birkbeck Sr. had actually purchased it in Atlantic County. He admitted that he had no proof that any package sent to appellant was actually received at his address.

Manera did not know precisely why Birkbeck was serving time. He agreed that Birkbeck was found in possession of a controlled dangerous substance. He also did not dispute that Birkbeck had convictions for theft by deception, armed robbery, and reckless driving. He did not know why Guaracci was in prison.

Manera acknowledged that the Final Notice of Disciplinary Action specifies that appellant brought contraband into the facility on numerous dates, but admitted that only date the agency could identify was December 9, 2013.

Manera agreed that he reviewed appellant's monetary situation. He found no evidence that appellant had monetary problems during 2012 and 2013. He also found no evidence that appellant had filed for bankruptcy during that time. He acknowledged that he was not aware whether appellant's wife worked outside the home, and had no knowledge of how much income if any, she contributed to the household during 2012 and 2013.

Manera agreed that Bridgeton and Upper Deerfield are separate municipalities. Manera agreed that he could locate no document where appellant stated that he lived in Bridgeton. However, he also stated that Bridgeton and Upper Deerfield share the same post office.

Manera agreed that inmate Birkbeck's letter to his father (R-14) was written primarily in cursive, but that appellant's address was printed. Manera similarly agreed that the statement in his report regarding the telephone call (R-7) contained verbatim quotes in quotation marks, but that the statements contained in parenthesis were comments created by himself.

Manera agreed that in reviewing Senior Corrections Officer Hughes' written statement (R-15), he never ascertained the exact two-year period Hughes was referring to when he stated. "I also observed this going on for the past two years".

Manera was asked if it was not true that since the appellant started his shift at 6 a.m. and Hughes began his shift on Sunday at 10:00 a.m. appellant would have been required to hold the contraband for over four hours in order for Hughes to see it. But Manera countered that appellant would go out to his vehicle to retrieve the contraband.

Manera agreed that no lobby officer was targeted in the matter. Nor was any supervisor disciplined. No inmate other than Birkbeck and Guaracci were targeted or charged.

Manera agreed that Crist told him she saw Hughes purchase chewing tobacco at Wawa. Manera agreed that he did not investigate whether Hughes used chewing tobacco.

Manera agreed that the charges against appellant were filed July 22, 2014, some four months prior to receiving Hughes' accusatory statement (R-15).

Craig Hughes, Jr. (Hughes) testified for the agency. Hughes was a Senior Corrections Officer at Southern State for eleven years. He is currently unemployed. He was terminated from his position at Southern State because he received a dollhouse from Birkbeck Sr.

Hughes acknowledged that while out on family leave, he asked Birkbeck to make a dollhouse for his daughter. Birkbeck made the dollhouse and sent it to his parent's house where he arranged for his father to deliver it to Hughes. When he received the dollhouse, Birkbeck Sr. called Hughes and arranged to deliver it. Birkbeck Sr. personally handed the dollhouse to Hughes.

Hughes did not know precisely how the dollhouse incident was discovered, but believed that Birkbeck had eventually told someone. Hughes was then charged with conduct unbecoming and undue familiarity.

Hughes denied ever smuggling in contraband to Southern State. He further denied ever smuggling in contraband for Birkbeck.

Hughes acknowledged that his testimony in appellant's trial was a condition of his removal. He confirmed that he had a plea agreement of some form in place that required him to resign and to testify.

Hughes stated he has known appellant for eleven years. They met at Southern State. He had no problem with appellant and bore him no grudge. They did not work on the same shift, but worked together on Sundays when Hughes worked a double shift.

Hughes testified that he saw the appellant pass contraband to Birkbeck. The contraband consisted of cigarettes and chewing tobacco which were contained in a zip lock bag. The zip lock bag was clear, and the contents were easy to see. The chewing tobacco was in a green plastic container. Hughes was standing on the other side of the desk at the Sergeants' office when he saw the transaction. It was at this location that he and appellant ate their lunch. The office was approximately six feet by eight feet. The only three people in the room were himself, appellant, and Birkbeck.

Hughes did not report the incident because of the so-called "blue code" which required that one uniformed officer never inform on another. However, he saw both appellant and Birkbeck use the products appellant smuggled into the prison. He also saw Birkbeck provide the contraband to another inmate.

Hughes stated that appellant smuggled the contraband into the prison in his vest underneath his shirt. He personally witnessed appellant removing the contraband from his vest. Sometimes the contraband was in a zippered pocket in the vest and

sometimes appellant pulled it out from under his shirt. Hughes stated that officers were not required to remove the vest they wore under their shirts when they entered the facility. When the form of vest utilized was changed, the officer was required to take off the vest. At that point, appellant began smuggling the contraband in under his shirt.

As part of his plea agreement, Hughes submitted a written statement confirming that he had observed appellant providing Birkbeck with cigarettes and chewing tobacco (R-15).

On cross-examination, Hughes acknowledged that neither he nor anyone in his household smoked cigarettes or smokeless tobacco, or chewed tobacco. He agreed that he had no reason to purchase any of those items.

Hughes acknowledged that during the course of his employment, he received four suspensions prior to his termination. Those suspensions were for time periods of three days, five days, fifteen days, and thirty days. All four suspensions were for what he termed Family Medical Leave Act (FMLA) issues. At the time of his termination, he had pending appeals of the major suspensions.

Hughes testified that prior to his April 29, 2014 interview with SID, he never previously alleged that appellant had smuggled contraband into the prison. He further agreed that he never put that allegation in writing prior to his statement of November 2014 (R-15). After reviewing the statement, he agreed that both the typing and handwriting contained on the statement was his.

Hughes agreed that in his statement of November 2014, (R-15), he stated that other officers had observed appellant bringing contraband into the facility and, that those officers subsequently confronted him about his allegation. Hughes identified those officers as Crist and McCauley. He further stated that although his statement referenced other inmates who had participated in the smuggling scheme, he could not remember the names of those inmates. He testified that at no time did SID ever ask

him to identify the “other officers” and “other inmates” referenced in his statement (R-15).

Hughes testified that when he wrote in his statement that he had seen the appellant bring contraband into the facility for the past two years, he meant two years from the last day that he worked. He testified that the last day he actually worked at the prison was April 29, 2014. He was suspended prior to his termination on May 8, 2014.

Hughes agreed that he did not see appellant bring in contraband every Sunday. Hughes explained that he worked with appellant on “reciprocals Sundays”. A reciprocal Sunday was a Sunday Hughes was filling in for another officer so that said officer could have the weekend off. The parties stipulated and agreed that January 1, 2012 and April 29, 2014 appellant and Hughes were grouped together as reciprocals at least thirty-five times.

Hughes acknowledged that as a result of his termination, he lost both his job and his pension.

James Paul Williams (Williams) testified for the agency. Williams was employed by the Department of Corrections until he retired on March 1, 2015 with the title of Principal Investigator. He was assigned to SID beginning in 2011. He holds a Bachelor's Degree in Law and Justice from Glassboro College.

Williams was a field unit supervisor. He performed investigation into crimes and rules violations, and supervised two other investigators.

Williams was also a document examiner. His job was to receive suspect writings and reach a conclusion as to their authenticity. Williams served as a handwriting analyst beginning in 2001. Williams has worked on fifty to sixty cases involving handwriting analysis. He was trained at the Federal Law Enforcement Training Center in Glenco Georgia by the United States Secret Service. After his training, he apprenticed under a noted document examiner, Elizabeth Markward, (Markward) for

two years. Markward had an extensive history testifying as an expert witness on handwriting analysis. Additionally, Williams has read Questioned Documents by Albert Osborn published in 1929, and Scientific Examination of Questioned Documents by Ordway Hilton. Williams testified that Hilton's book is the accepted text in the field today.

Williams testified that the purpose of handwriting analysis was to determine if a suspect is the writer of a questioned document. He follows the following procedure. First, he questions the examined writing. Then he looks for significant features in the writing. He then compares the questioned writing to samples of the alleged writer's handwriting. According to Williams, handwriting features are unique to each individual. He then forms an opinion which he rates on a nine-point scale. The nine-point range allows him to fix his opinion in one of the following categories:

Identification – Was definitely written by the writer of the known writing.
Highly probable – Ninety-five percent certainty that the document was written by the writer of the known writing.
Probably written by the writer of the known document.
Indications exist that it was written by the writer of the known document.
No conclusion – Not enough significant features to make a determination.
Indications that the document was not written by the writer of the known writing.
Probably was not written by the writer of the known writing.
Highly probable that it was not written by the writer of the known writing.
Elimination - Definitely was not written by the writer of the known writing.

Williams was offered as an expert in handwriting analysis.

On voir dire, Williams admitted that he had never been recognized as an expert witness in a Federal Court, the Superior Court of New Jersey, a Municipal Court in New Jersey, or the Office of Administrative Law. He stated that the nine-point scale can apply to both cursive and handwriting.

With no objection, Williams was qualified as an expert in handwriting analysis.

Williams submitted into evidence his written report (R-16). In that report, he compared the letter of November 2012, (R-14) to five of Birkbeck's own writings. He concluded that both the cursive writing and the printed writing on the November 6, 2012 letter (R-14) were written by Birkbeck.

Williams found significant features on the samples. He produced a chart (R-23) that highlighted those significant features. The left side of the chart showed writing from the letter of November 6, 2012. The right side of the chart showed writing from other known documents written by Birkbeck.

Williams noted that the uppercase in the word ASAP in the letter of November 6, 2012 contained a retracing stroke at the beginning and an upward curl at the end stroke. He found the same letter in three of Birkbeck's other writings. Similarly, the "k" in Peek in the November 6, 2012 letter was made with a downward stroke that has a slight curl to the right. He found the letter "k" made in a similar fashion of four of Birkbeck's known writings. Williams found the "a" and the "e" in Ave to be the same as those found in seven of Birkbeck's known writings. He found that the letter of November 6, 2012 contained a cursive "0" made with an overhand or clockwise motion as seen in other samples of Birkbeck's writing.

Williams gave other examples of his findings in his report. Appellant's attorney did not seriously challenge the report on cross-examination. But Williams conceded that he engaged in no psychological profiling of the handwriting nor did he reach any conclusion as to Birkbeck's motivation in writing the letter.

Barbara Rochow (Rochow) testified for the agency. Rochow is the Major at Southern State Correctional Facility and is the highest uniformed Officer at the facility. She has been employed by the Department of Corrections for twenty-one years.

Rochow testified that Southern State Correctional facility is a medium/minimum facility containing all types of offenders, including murderers, rapists, and child support

delinquents. Inmates at the facility are expected to work. One of the jobs performed by the inmates is that of unit runner. The unit runner cleans the unit when the other inmates are asleep. Unit runners have more mobility inside the facility than the average inmate. Birkbeck held this position at Southern State. As a result, he spent a certain amount of time in the Corrections Officer's office and had close contact with many Corrections Officers.

Rochow identified a directive banning tobacco products dated January 14, 2013 (R-17). The directive stated that as of February 15, 2013 tobacco was to be considered contraband. Both staff and inmates were forbidden to smoke.

Rochow identified Division of Operations Internal Management Procedure concerning security at facility entry points (R-18). The procedure delineated the authorized items that a Corrections Officer could bring into the facility. Rochow noted that coffee and tobacco products were not on the authorized list. For that reason, Rochow opined that appellant violated the procedure by bringing coffee and tobacco into the facility. She further opined that it would be unlikely that an officer bringing such contraband into the facility in a plastic baggie would be detected. She stated that a carefully concealed item could only be detected if it was metal. The security procedures were insufficient to locate a baggie containing such contraband.

Rochow identified the Department of Corrections Personnel Rules and Regulations (R-11). She specifically highlighted several regulations in that document that she believed appellant had violated. Article III Section 3 states as follows:

No officer shall act or behave in an official or private capacity, to the officer's discredit, or to the discredit of the Department.

Article III Section 4 states as follows:

No officer shall become unduly familiar with inmates who are incarcerated, on community release, or on parole status.

Article IX Section 6 states as follows:

Officers shall neither use nor attempt to use their official positions to secure unwarranted privileges or advantages, either for themselves or others.

Article IX Section 7 states as follows:

No officer shall accept directly or indirectly any gratuity, gift, favor, service or other thing of value under any circumstances from which it might be reasonably inferred that such was given or offered for the purpose of influencing the discharge of an officer's official duty.

Rochow testified that by cultivating a personal relationship with Birkbeck and engaging in a commercial enterprise with him by bringing in contraband so that Birkbeck could sell and receive compensation for the contraband, appellant violated all four regulations. He behaved in a manner that brought discredit on the department. He became unduly familiar with Birkbeck. He used his official position to secure an unwarranted advantage for himself by receiving money for bringing in contraband. And he accepted money from Birkbeck in return for bringing in contraband or otherwise treating Birkbeck in a favorable manner. Rochow stated that appellant was employed to watch the inmates. Instead, he sneaked contraband into the facility and provided it to Birkbeck. He accepted a gratuity for that service in the form of Wawa gift card.

In conducting himself in that fashion, appellant also violated the standards of professional conduct (R-12). Rochow noted that the Standards of Professional Conduct required appellant not establish or maintain a personal relationship with any inmate.

Rochow introduced into evidence a portion of the Department of Corrections Table of Offenses and Penalties (R-5). She noted that the penalty for conduct unbecoming an employee for a first offense was a range of a three-day suspension to removal. The penalty for improper or unauthorized contact with inmates – undue familiarity with inmates, parolees, their families or friends resulted in a range of an official written reprimand to removal for the first infraction.

Rochow testified that in this case, progressive discipline did not apply and the ultimate penalty of removal was required. She stated that appellant's conduct violated the most basic tenet of a Correction Officer's job. Correction Officers are there to protect the inmates and promote their well-being. Appellant compromised himself and the facility by becoming unduly familiar with Birkbeck, by bringing contraband into the facility, and by accepting payment for his services from Birkbeck's father. Rochow stated that in her opinion, such familiarity with an inmate was the worst thing a Corrections Officer could do. In appellant's case, his conduct warranted removal.

On cross-examination, Rochow testified that she has no control over whether Internal Affairs re-opens old investigations or opens a new investigation. Most officer violations are investigated by the local facility's SID unit. However, major cases are referred to Internal Affairs in Trenton. Rochow stated that she did not know how Internal Affairs received their referrals. All communications about investigations were conducted between Internal Affairs and the local SID unit. As the highest-ranking uniformed person in the facility, she was not privy to what went on in the investigative units. Rochow stated she does not become involved in discipline unless the offense is reported to her by with Internal Affairs or SID.

Rochow confirmed that between January 1, 2012 and December 31, 2013 the officer uniform was amended. Specifically, over the course of that time, most officers would be issued new vests. The old vests were worn underneath the uniform shirt. The new vests were worn on the outside of the shirt. The new vest has outer and inner carriers. Because the vests can be easily removed, they can be passed through the ion scanner at the prison gate. Rochow stated that when appellant was issued his new vest on July 9, 2013. Rochow again opined that coffee or tobacco contained in a plastic baggie would not be discovered if worn under a vest or secreted inside the vest.

Rochow agreed that tobacco was not considered contraband until February 15, 2013.

Appellant offered into evidence a video recording of the DVD interview of Senior Correction Officer Crist (Crist). Crist was the officer who found tobacco on inmate Birkbeck on December 9, 2013. She located the tobacco both on his person and in his bed-area. She asserted she had no knowledge how the tobacco came into the institution.

Crist was Officer Hughes's partner for approximately one-year. She stated that she personally never saw Hughes commit any infraction. However, over time she heard rumors about the appellant.

Specifically, Crist heard rumors that appellant was involved in bringing contraband into the institution. She likewise heard the same rumors about Officer Hughes, but most of the rumors were about appellant. She estimated that the rumors had duration of approximately two years. She heard that tobacco dip was being brought into the institution. She personally found tins formally containing dip in inmate's lockers. She conceded that the tins could have been picked out of the trash.

Crist noted that appellant and Birkbeck were frequently in the office alone together. Crist testified that she only worked with appellant on one of two occasions. She never actually saw either appellant or Hughes provide contraband to any inmate.

Crist also stated that Hughes was seen buying tobacco in Wawa. Tobacco was found on Birkbeck the same day.

Appellant offered into evidence a video disk containing the SID interview of Officer Hughes of April 29, 2014 by SID Investigators Manera and Wise.

The interview had duration of approximately one-hour. During that time, Hughes was repeatedly asked questions about whether he had acquired a dollhouse from Birkbeck's father. He continuously denied that any such event transpired. He also denied smuggling any contraband into Birkbeck. Finally, after the investigators applied intense pressure on him, Hughes admitted obtaining the dollhouse from Birkbeck's

father. He continued to deny bringing contraband into the facility. He asserted that the dollhouse was a gift in return for extra food he had obtained for Birkbeck. He continued to deny any knowledge of the origin of the tobacco found in Birkbeck's possession on December 9, 2013.

Appellant testified on his own behalf. Appellant is currently forty years old and was a Corrections Officer at Southern State from November of 2002 until he was terminated in May of 2014. His prior disciplinary record consisted of two written reprimands.

Appellant testified that between January 1, 2012 and January 1, 2014 his home address was 78 Roberts Avenue, Upper Deerfield, New Jersey. He stated he never listed Bridgeton as his home address on any documents. The towns are two separate municipalities, although he admitted that they shared a common post office.

Appellant was married during that time period to Karen Peek. His salary as a Corrections Officer was \$83,000 per year. His wife earned \$40,000 per year as a medical technician. He had no money problems, no bankruptcies, and no unusual expenses during that time period.

Appellant described the screening process at the entryway to the facility. Upon entering the front house, he was forced to remove his jacket, outer vest, and personal belongings. Those items all went through an ion scanner. The appellant would then walk through a metal detector and be patted down by the front house officer. That officer also used a wand to scan each officer entering the facility.

The appellant noted that it is possible to go to his car during his shift. He would then re-enter through a different egress point. However, on these occasions he was still wanded and patted down by the officer guarding the entryway. He conceded that at this entryway, there was no ion scanner or metal detector.

Appellant testified that initially the vest was worn under the outer shirt and was not removed when entering the facility. However, in July of 2013 he received a new vest that was worn on the outside of the shirt. From then on, he completely removed the vest when entering into the facility.

Appellant testified that he had no communication with Birkbeck outside of the facility and no contact with Birkbeck's family. He denied receiving phone calls from any member of Birkbeck's family. He denied receiving a visit at his house from any of Birkbeck's family or friends. He denied receiving any calls from Birkbeck's friends. He made the same series of denials regarding inmate Guaracci.

Appellant denied receiving an anonymous package at his house. He denied receiving a package from Birkbeck or his family at his house. He denied receiving a package from Guaracci or his family at his house. He denied receiving a package from either inmates' friend or from any other inmate.

Appellant denied receiving a gift card at his home from an anonymous source. He denied receiving a gift card at his home from Birkbeck. He denied receiving a gift card at his home from Guaracci. He denied receiving a gift card from any member of any inmate's family or any friend of either inmate. He denied receiving cash from Birkbeck, Guaracci or any family member or friend.

Appellant denied receiving a package at his home containing tobacco, chew, smokeless tobacco product, gum, magazines, steroids, and/or any other form of contraband. He denied smuggling into the facility tobacco, chew, smokeless tobacco product, gum, magazines, steroids and/or any other form of contraband.

Appellant conceded that he smuggled coffee into the facility. He acknowledged that coffee was not allowed into the facility, and that it is considered contraband. However, he stated that the coffee was brought in to be used by himself and other officers only, and not by any inmate. He acknowledged that he brought the coffee in through the front house entranceway. The coffee was contained in a one-gallon ziplock

bag. According to appellant, he would show the coffee to the front house officer, and the front house officer would let him through.

On cross-examination, appellant stated that he did not drink the coffee he brought in. Nor did he remember the name of the officer at the front house gate who let the coffee come in.

Appellant reviewed Birkbeck's letter of November 2012 (R-14). He offered no explanation for the contents of that letter. He acknowledged that Bridgeton and Upper Deerfield use the same post office, and that 78 Roberts Avenue was his address. He conceded that he has three children. He agreed that the letter contained his name. However, he denied ever receiving \$100 from Birkbeck. He had no explanation for why Birkbeck would write the letter.

Appellant noted that the letter was written on November 6, 2012 (R-14). At that time, tobacco was not considered contraband. According to the directive admitted into evidence (R-17) tobacco was banned in the facility effective February 15, 2013.

LEGAL DISCUSSION

Appellant is charged with a violations of N.J.A.C. 4A:2-2.3(a)6, Conduct unbecoming, and N.J.A.C. 4A:2-2.3(a)12, other sufficient cause. The other sufficient cause consists of a violation of three agency policies: HRB 84-17C.11 Conduct unbecoming an employee; HRB 85-17D.4 Improper or unauthorized contact with inmate - undue familiarity with inmates, parolees, their families or friends; and HRB85-17E.1, Violation of a rule regulation, policy, procedure, order or administrative action.

The specifications delineate that the offenses herein consist of undue familiarity on the part of the appellant. Specifically, he accepted packages from an inmate's family, smuggled the contents of those packages into the facility, and accepted compensation for his actions.

The charges are primarily supported by four factors: the oral statements of Birkbeck, Sr. and Birkbeck to investigator Manera; the letter from Birkbeck to Birkbeck, Sr., dated November 6, 2012 (R-14); and the testimony of Hughes.

In his interview with investigator Manera, inmate Birkbeck specifically admitted that on numerous occasions the appellant smuggled contraband into the facility and delivered it to Birkbeck. Birkbeck in turn sold the contraband and placed the money in his bank account at the facility, an activity that would explain the substantial deposits made by him into that account (R-8). Birkbeck also specifically confirmed that he instructed his father to provide appellant with a \$100 Wawa gift card to show appreciation for his help.

In his interview with investigator Manera, Birkbeck Sr. confirmed that he had sent packages containing tobacco, chewing tobacco, and x-rated magazines to the appellant's home at [REDACTED]. Birkbeck Sr. attributed that address to Bridgeton, New Jersey. Appellant testified that his home at [REDACTED] is actually in Upper Deerfield, New Jersey. However, all parties acknowledge that Bridgeton and Upper Deerfield share a common post office. I take official notice of the fact that Upper Deerfield and Bridgeton are situated immediately adjacent to each other. Birkbeck, Sr. further told Manera that the last package he sent to appellant containing tobacco, rolling papers and magazines was forwarded in early December of 2013. Birkbeck was caught with the contraband on December 9, 2013 shortly after his father forwarded the package to appellant.

The statements of Birkbeck, Sr. and Birkbeck constitute hearsay. Pursuant to N.J.A.C.:1-15.5, commonly known as the Residuum Rule, these statements cannot form the sole basis for disposition for this case unless supported by some scintilla of competent evidence. In this case, those statements are supported by the letter of November 6, 2012 and by the testimony of Hughes.

The agency established through the testimony of Williams that the letter of November 6, 2012 was written by Birkbeck. The letter was written over thirteen months

prior to the date on which the agency found the contraband in Birkbeck's possession. However, the letter establishes beyond question that appellant had an unduly familiar relationship with Birkbeck at that time. In the letter, Birkbeck asks his father to do him "a favor". The letter states: "I want to know if you would go to Wawa and buy a gift card for \$100 and send it to Josh Peek at [REDACTED] Bridgeton, NJ 08302 right, thank you and Merry Xmas. It's my C.O. here in my housing unit, he takes very good care of me and I live comfortable for jail because of him".

If Hughes testimony is to be believed, than there can be no question but that appellant had a business arrangement with Birkbeck over a protracted period of time whereby appellant smuggled contraband into the prison and was compensated for his actions. However, Hughes himself admitted to engaging in such conduct and has already lost his position as a Senior Corrections Officer with the DOC. He testified against the appellant as part of his plea agreement. For that reason, appellant suggest that Hughes' testimony is unreliable. It should be noted that his plea agreement consisted of a general resignation. Hughes testified that he did not maintain his pension rights under the terms of his agreement.

Appellant testified on his own behalf. He was asked a series of carefully crafted questions by his counsel that required him only to answer yes or no. In his answers, he denied engaging in the smuggling of contraband into the facility.

The question before this tribunal then is substantially one of credibility. If I believe the appellant, then he must be reinstated. If I believe that the letter (R-14) and the testimony of Hughes buttress the hearsay statements of Birkbeck Sr. and Birkbeck then appellant is guilty of the charges.

I am satisfied that the letter of November 6, 2012 by itself constitutes a scintilla of competent evidence sufficient to buttress the hearsay statement of Birkbeck Sr. and Birkbeck. By the terms of that letter alone, the appellant is guilty. That letter states that Birkbeck, Sr. was to provide appellant with a \$100 gift card because "he takes very

good care of me and I live comfortable for jail". It is unacceptable for a corrections officer to accept a gift from an inmate. That action alone constitutes undue familiarity.

But further, I am satisfied that Hughes testimony was credible and appellant's was not. At this point, Hughes has nothing to gain by lying. Regardless of the outcome of this proceeding, he has lost his job. He can derive nothing more by lying.

Additionally, Hughes presented in a credible and believable manner on the witness stand. He did not deny his own wrongdoing. He did not attempt to justify his misconduct. He admitted what he did in a clear and convincing manner. I am satisfied that he told the truth.

Appellant was also convincing in his testimony on the stand, but as described heretofore, the carefully crafted questions posed to him required only that he answered yes or no. But such was not the case during his interview with the investigators.

That interview was entered into evidence on a CD that was played during the trial (R-20). During that interview with investigators Manera and Wise, appellant presented in a totally different manner. During that interview, he did his best to avoid the questions posed to him. His two primary responses were, "I don't recall", and "I didn't knowingly ..." . Here is a sample of his statement during the interview. The notation "JP" denotes statements made by appellant and "SM" is Investigator Manera:

SM: Alright, so you used to live at [REDACTED]. Correct?

JP: Yes.

SM: And, I'm gonna talk to you about um, some um, packages that were received at your residence. Okay?

JP: Umm ummm.

SM: Last year there was num- . . . I don't want to say numerous, several packages mailed to your residence..

JP: Okay.

SM: Um, to you, to your name, Joshua Peek.

JP: Ah hum.

SM: Did you receive some packages last year?

JP: I may have received packages, I don't know, I bring them in the house and put them on the counter. At that time, I was at the house and I take the kids and take a shower and go pick up the kids.

SM: Okay, but the packages had your name on them.

JP: I've had lots of packages delivered to my house.

SM: Okay. These packages would have come from Absecon, Leeds Point...

JP: I don't recall.

SM: You don't recall, or you didn't get any?

JP: I don't recall what it was. I get lots of packages. UPS packages...

SM: These were post office.

JP: I don't recall any particular return address...

SM: So did you receive packages or you didn't?

JP: I received tons, yeah, I received lots of packages.

SM: Okay. Um, your RDO's are Wednesday and Thursday, is that correct?

JP: Yes sir.

SM: Okay, um, on Tuesday, November 14, 2013, there was a package sent from the Absecon Post Office.

JP: Okay.

SM: Okay. November 15, it arrived at the Bridgeton Post Office.

JP: Okay.

SM: November 16, it arrived at [REDACTED].

JP: Okay. [REDACTED]?

SM: At your, your address. Um, do you recall that package? Could it have been that you received it?

JP: I don't know, that's going back what date?

SM: Ahh, November 16.

JP: I don't recall.

SM: Okay. On December 3, 2013.

JP: Mmmm mmmm..

SM: ..there was a package sent from Leeds Point Post Office, okay?

JP: Umm mmm.

SM: December 4, December 3, I said, correct? December 4 the package arrived at Bridgeton Post Office. December 5, 78 Roberts, December 9 the contents of that package was found on 2 Unit.

JP: I don't know. What contents was that?

SM: Five bags of tobacco, um, when I say tobacco that includes chewing tobacco and smoking tobacco.

JP: Mmmm hmmm.

SM: Okay. Also, um, along with the packages, there was some might have been a WaWa card in there. Any of this coming to...

JP: (Nods head in the negative). Not that I know of.

SM: No? Okay. Um, the packages also contained, the November package contained \$150 and the December package contained \$300.

JP: Okay.

SM: For the smuggling fee. Okay? Um, the person that sent the packages is the one that gave me the address in your name.

JP: Okay.

SM: Okay. The packages came from Barry Birkbeck, Sr.

JP: Okay.

SM: He resides in Absecon. Okay? See where I'm going with this?

JP: I hear you, yeah.

SM: The, those two packages were purchased by Mr. Birkbeck, inmate Birkbeck's father.

JP: Hmmmm mmm.

SM: Okay, the contents of those packages. The packages prior to that were sent to him by another inmate's family. That inmate's name is Christopher Guaracci. You familiar with that inmate?

JP: No.

SM: He used to be on your unit?

JP: I work reception. A lot of inmates come in that area.

[SM showed JP a picture.]

SM: Do you know him?

JP: I seen his face, if he was in there, I mean, I seen a lot of guys in and out of there.

SM: Okay. So, that being said, the, um, packages that were sent to your residence, where are they?

JP: Like I said, I bring them in the house, if I receive any package, they go in the house.

SM: Okay, then what do you do with them?

JP: I'm so busy, I leave there and go get the kids or I'm running around doing whatever I have to do. I'm a busy guy.

SM: I understand that, but if you have a package that comes in your name...

JP: Karen could have opened it. I could have opened it.

SM: The packages come on your RDO's, that way your wife doesn't know that you're getting the packages.

JP: Oh, I....

SM: They're specifically mailed on a Tuesday to arrive there on your days off. Right now, I see your wheels are spinnin'.

JP: (Laughing) No, they're not.

SM: You're wondering how I know all of this. Right?

JP: No, I get pack, what am I supposed to do? I get packages, I receive packages, I get lots of packages at the house. (Laughing), what do you? I don't know what...

SM: I'm trying to get the truth, is what I'm trying to do.

JP: I don't know nothing about those packages.

SM: You don't know nothing about packages...

JP: No.

SM: So you're saying those packages didn't come to your house?

JP: I'm not saying no packages, I'm not saying they did or didn't come to my house. If...

SM: If you receive....

JP: If I open up a package and there was whatever was the contents of it, I don't recall seeing any of those contents.

SM: You don't recall?

JP: I don't remem-, yeah, I never opened a box and had them, whatever you just said was in those boxes.

Another example of appellant's avoidance tactics during the interview are shown in the following exchange:

SW: The Wawa cards that you received in the mail, did you use them?

JP: Ah, there was always Wawa cards, either like Christmas gifts that we don't use..

SM: In the packages?

JP: I never, you're telling me these packages, I don't ever recall opening a box and inside of the package being tobacco.

SM: Okay, you received a \$100 Wawa gift card, okay? Did you use that Wawa gift card?

JP: I can tell you I used many Wawa gift cards. You're asking me if I used one specific WaWa card, I don't know if I used that specific Wawa card. I can tell you that if there's a WaWa card on the counter or on the windowsill, I will take the Wawa card and I'll go down there and I'll use it.

SM: Okay. Last year, how many times would you say you received Wawa gift cards in the mail? For \$100?

JP: I receive Wawa cards on my birthday, I receive Wawa cards on Christmas.

SW: What kind of denominations do they come in? How much money is on them?

JP: I don't, Karen gets Wawa cards, we do whatever the Christmas thing is. We get Wawa cards for all different denominations, \$25, \$50, \$100. I mean, all different amounts.

SM: \$150?

JP: I get Wawa denominations for all different amounts. Karen might have gotten one for \$100, and used 20 on it now there's 80 left. I don't know, go in there and swipe it. If it works, it works. If it don't, it don't.

As the above portions of the interview demonstrate, appellant did everything he could to avoid providing a straight answer to the investigator's questions. Throughout the interview, he equivocated and prevaricated. He bobbed and weaved.

His answers were a classic example of avoidance. It was evident that appellant did not know what information the investigators had. Consequently, he did his best to avoid directly answering the questions posed; thereby leaving him leeway to backpedal should he subsequently learn that the investigators had specific information that would implicate him. His evasiveness only demonstrated the unreliability of his statements. At trial, his attorney saw to it that he only had to answer yes or no to the key questions. But his performance at the April 29, 2014 interview demonstrated the unreliability of his denials.

In the final analysis, the evidence against the appellant is overwhelming, and his denials were unbelievable. Accordingly, the agency's action sustain the charges must be **AFFIRMED**.

There remains the issue of penalty. Progressive discipline is the law in New Jersey. See West New York v. Bock, 38 N.J. 500, 522 (1962). Progressive discipline may only be disregarded when the misconduct is egregious see In Re Hermann, 192 N.J. 19 (2007).

In this case, I am satisfied that appellant's conduct was egregious. As Major Rochow testified, undue familiarity with an inmate damages the core mission of the Department of Corrections. If the security of the corrections system is to be maintained, such undue familiarity cannot be tolerated. Accordingly, the agency's action terminating appellant from his position as Senior Corrections Officer must be **AFFIRMED**.

ORDER

I **ORDER** that the agency's action sustaining the charges of unbecoming conduct and other sufficient cause be **AFFIRMED**.

I **ORDER** that the agency's action terminating appellant from his employment with the Department of Corrections be **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. 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.

July 8, 2015

DATE



BRUCE M. GORMAN, ALJ

Date Received at Agency:

July 8, 2015

Date Mailed to Parties:

July 8, 2015

/jb/l

WITNESSES AND DOCUMENTS IN EVIDENCE

WITNESSES

For Appellant:

Joshua Peek

For Respondent:

Stephen Manera

Craig Hughes, Jr.

James Paul Williams

Barbara Rochow

EXHIBITS

For Appellant:

- P-1 Work History of Appellant
- P-2 Criminal Record of Birkbeck
- P-3 Criminal Record of Guarraci
- P-4 Intentionally omitted
- P-5 Intentionally omitted
- P-6 Intentionally omitted
- P-7 Intentionally omitted
- P-8 Intentionally omitted
- P-9 Intentionally omitted
- P-10 Intentionally omitted
- P-11 Intentionally omitted

- P-12 Intentionally omitted
- P-13 Intentionally omitted
- P-14 Intentionally omitted
- P-15 Intentionally omitted
- P-16 Intentionally omitted
- P-17 Intentionally omitted
- P-18 Intentionally omitted
- P-19 Intentionally omitted
- P-20 Intentionally omitted
- P-21 Intentionally omitted
- P-22 Intentionally omitted
- P-23 Intentionally omitted
- P-24 Intentionally omitted
- P-25 Intentionally omitted
- P-26 Intentionally omitted
- P-27 Intentionally omitted
- P-28 Crist DVD
- P-29 Hughes DVD

For Respondent:

- R-1 Preliminary Notice of Disciplinary Action, dated May 6, 2014
- R-2 Final Notice of Disciplinary Action, dated July 22, 2014
- R-3 Intentionally omitted
- R-4 Intentionally omitted
- R-5 Intentionally omitted
- R-6 Intentionally omitted
- R-7 Report of SID Investigator Stephen Manera
- R-8 Inmate Birkbeck check and receipt transactions
- R-9 Joshua Peeks' Employee Dental Plan Application
- R-10 Supplemental Report of SID Investigator Stephen Manera, dated June 3, 2014

- R-11 Law Enforcement Rules and Regulations
- R-12 DOC Standards of Professional Conduct
- R-13 Intentionally omitted
- R-14 Inmate Birkbeck's letter to father, Barry Birkbeck, Sr., dated November 6, 2012.
- R-15 Statement of Craig Hughes
- R-16 Handwriting Analysis Investigator James Williams
- R-17 Directive DC Ban on Smoking and Tobacco Products at NJDOC
- R-18 Intentionally omitted
- R-19 Interview of Joshua Peek DVD
- R-20 Recording of Inmate Birkbeck telephone calls CD
- R-21 Intentionally omitted
- R-22 Intentionally omitted
- R-23 Handwriting Analysis Chart

Court:

- C-1 Waiver of Conflict of Interest
- C-2 Certification of Counsel