STATE OF NEW JERSEY

In the Matter of Gary MacDonald
Mercer County
Department of Public Safety

CSC DKT. NO. 2014-28
OAL DKT. NO. CSR 9803-13

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: September 3, 2014 PM

The appeal of Gary MacDonald, a County Correction Officer with Mercer County, Department of Public Safety, removal effective June 25, 2013, on charges, was heard by Administrative Law Judge Edward J. Delanoy, who rendered his initial decision on May 19, 2014. Exceptions and cross exceptions were filed on behalf of the parties.

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 September 3, 2014, 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 removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Gary MacDonald.

Re: Gary MacDonald

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
SEPTEMBER 3, 2014

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 9803-13
AGENCY DKT. NO. N/A
2014-28

IN THE MATTER OF GARY MACDONALD, MERCER COUNTY CORRECTION CENTER.

Jessica Arndt, Esq., for appellant Gary MacDonald (Alterman & Associates, attorneys)

Kristina E. Chubenko, Assistant County Counsel, for respondent Mercer County Correction Center (Arthur R. Sypek, Jr., County Counsel)

Record Closed: April 15, 2014 Decided: May 19, 2014

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

STATEMENT OF THE CASE

Appellant Gary MacDonald was removed from his position as a correction officer at Mercer County Correction Center (MCCC) after numerous charges were sustained.

On December 29, 2010, appellant was charged for an event on October 12, 2010, with a violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and a violation of N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause, for

violations of the Mercer County Table of Offenses and Penalties, Section D-6 and SOP 004 and SOP 238—violation of administrative procedures and/or regulations involving safety and security, and Section C-8 (Step 3)—falsification: intentional misstatement of material fact in connection with work, employment, application, attendance, or in any record, report, investigation or other proceeding. The allegation relating to these charges is that appellant left his assigned post during his tour of duty without being properly relieved and without authorization. Appellant is also charged with falsifying reports and making false statement to Sergeant Asa L. Paris.

On June 10, 2011, as amended on February 14, 2013, appellant was charged for an event on April 26, 2011, with a violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; violations of N.J.A.C. 4A:2-2.3(a)(1) and (7), incompetency, inefficiency or failure to perform duties and neglect of duty; and a violation of N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause, for violations of the Mercer County Table of Offenses and Penalties. These alleged violations relate to Section B-3—sleeping while on duty, and Section C-8—falsification: intentional misstatement of material fact in connection with work, employment, application, attendance, or in any record, report, investigation or other proceeding.

On August 9, 2011, as amended on January 14, 2013, appellant was charged with a violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and violations of N.J.A.C. 4A:2-2.3(a)(11) and (a)(4), chronic and excessive absenteeism from work, under both the Administrative Code and the Mercer County Table of Offenses and Penalties (Steps 1 through 5). The allegations are that on August 4, 2011, November 14, 2012, November 27, 2012, December 11, 2012, and December 18–27, 2012, appellant was absent without available leave.

On September 8, 2011, appellant was charged for an event on August 16, 2011, with a violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and a violation of N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause, for violation of the Mercer County Table of Offenses and Penalties, Section D-6 (Step 2) and SOP 238—violation of administrative procedures and/or regulations involving safety and security, and Section C-8 (Step 5)—falsification: intentional misstatement of material fact in

connection with work, employment, application, attendance, or in any record, report, investigation or other proceeding. The allegation is that appellant failed to respond to a code on the detention floor, and when filing a report he made false statements as to his reasons for not responding to the code.

On December 14, 2011, appellant was charged for an event on December 12, 2011, with a violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and a violation of N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause, for violating the Mercer County Table of Offenses and Penalties, Section D-6 (Step 3), and SOP 004 and SOP 238. The allegation is that appellant left his assigned post of a one-to-one suicide watch without being properly relieved.

On May 24, 2012, appellant was charged for an event on May 6, 2012, with a violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and a violation of N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause, for violating the Mercer County Table of Offenses and Penalties, Section C-9 (Step 2)—insubordination: intentional disobedience or refusal to accept reasonable order, assaulting or resisting authority, disrespect or use of insulting or abusive language to a supervisor. The allegation is that appellant failed to follow specific orders to have all tents taken down in the cells on the detention floor. The order was given to him by Sergeant Gary Victor.

On September 3, 2012, appellant was charged for an event on August 27, 2012, with a violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, a violation of N.J.A.C. 4A:2-2.3(a)(2), insubordination, and a violation of N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause, for a violation of the Mercer County Table of Offenses and Penalties, Section C-9 (Step 3)—insubordination: intentional disobedience or refusal to accept reasonable order, assaulting or resisting authority, disrespect or use of insulting or abusive language to a supervisor. The allegation is that upon being relieved, appellant failed to report to a scheduled disciplinary hearing and failed to report to master control when ordered to do so by Lieutenant Santitoro.

On September 26, 2012, appellant was charged for an event on September 3, 2012, with a violation of N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to

perform duties; a violation of N.J.A.C. 4A:2-2.3(a)(2), insubordination; a violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; and a violation of N.J.A.C. 4A:2-2.3(a)(7), neglect of duty. Officer MacDonald was also charged with a violation of N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause, for a violation of the Mercer County Table of Offenses and Penalties, Section C-9 (Step 4)—insubordination: intentional disobedience or refusal to accept reasonable order, assaulting or resisting authority, disrespect or use of insulting or abusive language to a supervisor, and Section B-2—performance, relating to neglect of duty, loafing, idleness or willful failure to devote attention to tasks which could result in causing danger to persons or property. The allegation is that appellant failed to follow specific orders given to him by Sergeant Fioravanti regarding the operation of the detention-floor housing unit.

PROCEDURAL HISTORY

Appellant was issued Preliminary Notices of Disciplinary Action (PNDAs) on the following dates: December 29, 2010, June 10, 2011 (amended February 14, 2013), August 9, 2011 (amended January 14, 2013), September 8, 2011, December 14, 2011, May 24, 2012, September 3, 2012, September 26, 2012, December 24, 2012 (amended January 14, 2013), December 28, 2012 (amended January 14, 2013), January 1, 2013 (amended January 14, 2013), and January 7, 2013 (amended January 14, 2013). Departmental hearings were held on January 24, 2013, February 15, 2013, and April 15, 2013, and all charges were sustained, resulting in suspension or removal. A Final Notice of Disciplinary Action (FNDA) was filed on June 21, 2013, removing appellant from his position. (T-1.) Appellant appealed on June 27, 2013, and on July 2, 2013, the matter was filed at the Office of Administrative Law (OAL) 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 hearing was held on September 24, 2013, October 16, 2013, February 19, 2014, and March 18, 2014. Appellant waived back pay and agreed to toll the 180-day rule for the period from October 16, 2013, until February 19, 2014, to review medical records and talk to outside counsel. Summation briefs were submitted on April 15, 2014, and on that date the record was closed.

1. Time and Attendance Charges Incidents

FACTUAL DISCUSSION

Testimony

Captain Richard Bearden has been employed by MCCC for twenty-three years. Employees of MCCC receive fifteen sick days a year. With regard to the time and attendance charges, appellant called out of work for his shift on August 4, 2011, citing the Family Medical Leave Act (FMLA) as the reason. (R-4.) However, at that time, appellant's FMLA time had expired, and he did not have sick or personal time remaining. (R-5; R-6.) As a result, appellant was charged by Bearden with chronic or excessive absenteeism. (R-3.)

Appellant called out of work for his shift on November 14, 2012, citing the FMLA as the reason. (R-8.) However, at that time, appellant's FMLA time had expired, and he did not have sick or personal time remaining. (R-9; R-10.) As a result, appellant was charged by Bearden with chronic or excessive absenteeism. (R-7.)

Appellant called out of work for his shift on November 27, 2012, citing the FMLA as the reason. (R-12.) However, at that time, appellant's FMLA time had expired, and he did not have sick or personal time remaining. (R-13; R-14.) As a result, appellant was charged by Bearden with chronic or excessive absenteeism. (R-11.)

Appellant called out of work for his shift on December 11, 2012. (R-17.) However, at that time, appellant did not have sick or personal time remaining. (R-16; R-18.) As a result, appellant was charged by Bearden with chronic or excessive absenteeism. (R-15.)

Appellant called out of work for his shifts on December 18, 2012, through December 27, 2012, citing the fact that he had no time and had to call out and that he was at the emergency room or had an emergency as the reasons. (R-20; R-22; R-25; R-28; R-31.) However, at that time, appellant's leave time had expired, and he did not

have sick or personal time remaining. (R-21; R-23; R-24; R-26; R-27; R-29; R-30; R-32; R-33.) As a result, appellant was charged by Bearden with chronic or excessive absenteeism. (R-19.)

During these call-outs, other officers had to be called in and paid overtime to cover appellant's shift. The impact of such absenteeism is to create morale issues and to drain the County's resources. The steps for each of the aforementioned violations were determined by Bearden. (R-88.)

Alejandra M. Silva is a personnel clerk for the Mercer County Office of Employee Relations. She is in charge of handling leave requests under the FMLA. The FMLA is used when employees require time off for serious health conditions for themselves or a member of their family. Sixty days of FMLA leave are allowed within a one-year period. Potential applicants are told to meet with their doctor first, and then to apply for leave under the FMLA.

Silva was familiar with appellant, having spoken to him numerous times on the telephone about his leave. Silva drafted the letter to appellant dated February 22, 2011, approving FMLA due to personal illness for the period February 1, 2011, through August 1, 2011. She mailed the notice via regular mail to the employee's home on March 1, 2011. (R-34.) On August 1, 2011, this approval expired and a new medical certification was required to obtain additional time off under the FMLA. Appellant did not ask for additional FMLA time prior to August 1, 2011. Silva explained the program to appellant and spoke to him on many occasions.

On September 1, 2011, Silva drafted a letter to appellant which stated, in part, "Because your intermittent period was approved through August 1, 2011, you must reapply for FMLA, if medically necessary, in order to continue using FMLA." The letter was picked up by appellant on September 1, 2011, and a notice to that effect was made on the letter. (R-35.)

On October 20, 2011, a new letter authorizing FMLA for appellant was generated. It was mailed to appellant on October 21, 2011, and authorized FMLA

intermittent usage from September 29, 2011, through March 29, 2012. (R-36.) Appellant was not approved for family leave during the period August 2, 2011, through September 28, 2011.

An additional letter of approval under intermittent FMLA for the period May 3, 2012, through November 3, 2012, was mailed to appellant on May 25, 2012, and noted on that letter. Appellant was not approved for family leave for the period of September 29, 2011, through May 2, 2012. (R-37.)

On August 4, 2011, November 14, 2012, November 27, 2012, and December 11, 2012, appellant did not have FMLA leave available to him. An officer is required to reapply for family leave when the current leave-approval date expires. Silva explained how the process worked several times to appellant. All sick leave and other paid leave must be used before an employee uses FMLA leave. Appellant's 2013 application was denied by Mercer County.

Gary MacDonald called in for FMLA sick time on August 3, 2011. (R-4.) Appellant would not have called out if he did not believe he had the requisite time. He called in for FMLA sick time again on November 13, 2012 (R-8), and November 26, 2012 (R-12). He called in personal sick days on December 10, 2012 (R-17), December 17, 2012 (R-20), December 18, 2012 (R-22), December 22, 2012 (R-25), December 24, 2012 (R-28), and December 26, 2012 (R-31). On December 19, 2012, appellant was admitted to and discharged from St. Francis Medical Center. (A-2a through A-2c.) On December 21, 2012, appellant's primary physician, Dr. Hogan, advised that appellant had heart disease. (A-3.) On January 21, 2013, Dr. Felipe wrote a prescription note stating that appellant was advised that as of his discharge on December 19, 2012, he could rest for a week if needed. (A-1.) Appellant knew he was out of sick time when he made the November and December 2012 call-outs, but he had to call out because he believed he was suffering a heart attack.

FINDINGS OF FACT

Given the apparent contradiction of the versions of events as offered by respondent's witnesses and appellant, it is my obligation and responsibility to weigh the credibility of the witnesses in this matter in order to make a determination. Credibility is the value that a fact finder gives to a witness's testimony. The word contemplates an overall assessment of a witness's story in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). The term has been defined as testimony that must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955) (quoting In re Perrone's Estate, 5 N.J. 514, 522 (1950)). In assessing credibility, the interests, motives or bias of a witness are relevant, and a fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973). Credibility does not depend on the number of witnesses and the finder of fact is not bound to believe the testimony of any witness. In re Perrone's Estate, supra, 5 N.J. 514.

The respondent's evidence was the testimony of Silva and Bearden. Silva is the clerk who spoke to appellant many times and explained the FMLA process to him, and she was familiar with letters sent to him regarding his FMLA time. Bearden was familiar with the days on which appellant called out sick.

Appellant's position is that he was suffering from heart issues. As such, he should be forgiven for the use of sick days. However, the evidence shows that appellant called out sick on each of the days listed in the attendance records, and that he did not have any available leave time under the FMLA or other source. Appellant was aware of his FMLA issues, yet he failed to reapply for FMLA when his approvals expired. For the foregoing reasons, I do not credit the testimony of appellant. Conversely, I **FIND** that Silva and Bearden were both credible and that their testimony was consistent with the proofs.

The record in this incident includes documentary evidence and the testimony of the individuals who witnessed or had knowledge of the incidents they described. After carefully considering the testimonial and documentary evidence presented, and listening to testimony and observing the demeanor of the witnesses, I **FIND** the following to be the relevant and credible **FACTS** in this matter: Sixty days of FMLA leave is allowed within a one-year period. Potential applicants are told to meet with their doctor first, and to then apply for leave under the FMLA. Appellant was approved for FMLA leave due to personal illness for the period February 1, 2011, through August 1, 2011. Appellant failed to reapply for FMLA leave, and as a result appellant was not approved for family leave during the period August 2, 2011, through September 28, 2011. On August 4, 2011, November 14, 2012, November 27, 2012, and December 11, 2012, appellant called out sick, but he did not have FMLA leave available to him. Appellant called out of work for his shifts on December 18, 2012, through December 27, 2012, citing the fact that he had no time and had to call out and that he was at the emergency room or had an emergency as the reasons. However, at that time, appellant's leave time had expired, and he did not have sick or personal time remaining.

LEGAL ANALYSIS

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 11A:1-2(a). Such a civil service employee may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a).

In appeals concerning major disciplinary actions brought against classified employees, the burden of proof is on the appointing authority. N.J.A.C. 4A:2-1.4(a). The standard of proof in administrative proceedings is a preponderance of the credible

evidence. In re Polk License Revocation, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958). The preponderance may also be described as the greater weight of credible evidence in a case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Testimony, to be believed, must not only proceed from the mouth of a credible witness, but it must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 554–55 (1954). Both guilt and penalty are redetermined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). An appeal to the Merit System Board requires the Office of Administrative Law to conduct a de novo hearing and to determine the appellant's guilt or innocence, as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987); Cliff v. Morris County Bd. of Soc. Servs., 197 N.J. Super. 307 (App. Div. 1984).

Based on the specifications, appellant was charged with a violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and a violation of N.J.A.C. 4A:2-2.3(a)(11) and (c)(4), for chronic and excessive absenteeism from work both under the Administrative Code and the Mercer County Table of Offenses and Penalties (Steps 1 through 5).

Appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee. Conduct unbecoming a public employee has been described as an elastic phrase that includes any conduct that adversely affects the morale of governmental employees or the efficiency of a public entity or conduct that has a tendency to destroy public respect for governmental employees and confidence in public entities. Karins v. City of Atl. City, 152 N.J. 532, 554–57 (1998); In re Emmons, 63 N.J. Super. 136 (App. Div. 1960). A finding or conclusion that a public employee engaged in unbecoming conduct need not be based upon the violation of a particular rule or regulation and may be based upon the implicit standard of good behavior governing public employees consistent with public policy. City of Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955); Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992).

Even disregarding the August 4, 2011, call-out, and conceding that appellant may have thought he had sick time available, appellant called out for twelve days over a six-week period from November 27, 2012, until December 27, 2012. Regardless of the excuse, appellant's excessive absences were not covered by any leaves. He exhausted all of his sick time and still called out sick. During these call-outs, other officers had to be called in and paid overtime to cover appellant's shift. The impact of such absenteeism is to create morale issues and to drain government resources. This is conduct that adversely affects the morale of governmental employees or the efficiency of a public entity or conduct that has a tendency to destroy public respect for governmental employees and confidence in public entities. I **CONCLUDE** that the respondent has met its burden of proof on this charge.

Appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(11) and (c)(4), for chronic and excessive absenteeism from work both under the Administrative Code and the Mercer County Table of Offenses and Penalties (Steps 1 through 5). Chronic conduct is conduct that continues over a long time or recurs frequently. Good v. N. State Prison, 97 N.J.A.R.2d (CSV) 529, 531. "Excessive" is defined as "exceeding a normal, usual, reasonable, or proper limit," American Heritage Dictionary 638 (3rd ed. 1992); see also Rios v. Paterson Hous. Auth. CSV 3009-02, Initial Decision (August 1, 2005), adopted, Comm'r (September 13, 2005), <http://njlaw.rutgers.edu/collections/oal/>. "Just cause for dismissal can be found in habitual tardiness or similar chronic conduct." W. New York v. Bock, 38 N.J. 500, 522 (1962). While a single instance may not be sufficient, "numerous occurrences over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty." Ibid. There is no constitutional or statutory right to a government job. Our laws, as they relate to discharges or removal, are designed to promote efficient public service, not to benefit errant employees. State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998).

Appellant's failure to report to work on the aforementioned days constitutes chronic and excessive absenteeism from work. I **CONCLUDE** that the respondent has met its burden of proof on this charge.

2. Incident of April 26, 2011—Sleeping and Failing to Conduct Security Checks

FACTUAL DISCUSSION

Testimony

Lieutenant Phyllis Oliver has been employed at the MCCC for twenty-nine years. She has been a supervisor of the Internal Affairs department since 2008. On April 26, 2011, Lieutenant Oliver was working the 11:00-p.m.-to-7:00-a.m. shift at the MCCC. Her duties during that shift included security checks and scanning the facility by the use of video cameras. The camera monitor screens are located within her office.

At approximately 4:35 a.m., Oliver observed appellant on camera, in a chair on the detention unit leaning back with no movement. The detention unit is an inmate housing unit which includes high security inmates. The video camera remained on appellant for an extended period of time. There was no movement by appellant for approximately twenty-five minutes. Appellant was required to perform walking security checks of each of the thirteen cells on the unit every thirty minutes.

At 4:59 a.m., appellant was observed on camera completing inmate control sheets in his log book. After completing the sheets, appellant rested his head on his hand at 5:05 a.m. and did not move again until 5:46 a.m. (R-46.) From 4:35 a.m. until 5:46 a.m. appellant did not get up from his chair and perform any security checks. This fact was confirmed by the video. At approximately 5:46 a.m., Oliver observed appellant completing entries in the log book indicating that he completed his required security checks at 5:00 a.m. and 5:30 a.m. (R-42.) At 5:50 a.m., Oliver approached and spoke to appellant. She made an entry in the log book at 5:50 a.m. disputing that the 5:00 a.m. and 5:30 a.m. checks were completed. Appellant cannot be seen on the video between 5:48 a.m. and 5:52 a.m. Oliver agreed that a security check could have been performed during this time.

Oliver also reviewed the inmate control sheets. They also indicated security checks at 5:00 a.m. and 5:30 a.m. for each inmate, as well as a security check at 6:00 a.m., a time that had not yet occurred. The control sheets also specifically confirmed that a number of inmates were being housed on that unit in administrative segregation, as well as for disciplinary matters.

Based upon her observations in person and on video (R-50), Oliver ordered appellant to complete an incident report explaining what had occurred. The first incident report submitted by appellant did not address the issues raised by Oliver and contained irrelevant or non-factual statements regarding appellant's actions. (R-44.) Oliver signed this first report but did not accept it. Sergeant Paris confirmed that appellant was advised to complete an incident report addressing the issues raised by Oliver. (R-43.) Later that day, appellant submitted a new report which addressed some of the issues raised by Oliver. In that report, appellant acknowledged that he "briefly dozed, or went into a light sleep. I woke up and was startled . . . ." (R-45.) Appellant did not state that he was speaking to an inmate during this time in his report.

Oliver concluded that appellant was sleeping on duty during the period of non-movement and that appellant neglected his duty under SOP 419 #21 (R-47); SOP 420, Sections A and C-1, -2 and -3 (R-48); and SOP 240 K, Section D-1 (R-49). Appellant was trained on the aforementioned SOPs in 2004 (R-89), 2007 (R-90; R-91), and 2009 (R-92).

SOP 240 K, Living Unit Post Orders, provides in relevant part:

> B. The R&D Detention/Administrative Segregation Living Unit is currently used to house male inmates that have received detention time as a sanction for committing institutional infractions, inmates that have allegedly committed infractions of a serious nature and are awaiting Court (Pre-Hearing Detention Inmates), and Administrative Segregation Inmates.
>
> . . . .

> D. Responsibilities: The R&D Detention/Administrative Segregation Living Unit Officers duties will include the following:
>
> > 1. The R&D Detention/Administrative Segregation Living Unit Officer is required to make security checks every thirty minutes to ensure the safety of all R&D Detention/Administrative Segregation inmates, and the soundness of the Living Unit.
>
> [R-49.]

SOP 419, Administrative Segregation, provides in relevant part: "21. The officer assigned to the Administrative Segregation Unit will be responsible for completing an Inmate Control Sheet (form 420.F1) on each inmate on his unit classified as Administrative Segregation." (R-47.)

SOP 420, Lock-In Status Inmates, provides in relevant part: "A. It is the policy of the Mercer County Correction Center to maintain security and ensure the safety and well being [sic] of all inmates assigned to Lock-In status. It is required that a separate Inmate Control Sheet (Form 420.F1) be maintained on each inmate while classified to Lock-In status, which includes Protective Custody, Administrative Segregation, Medical and Detention." (R-48.) Further, section C, titled "Procedure," reads as follows:

> 1. Each Living Unit Officer assigned to an inmate housing area that houses inmate(s) classified to Lock-In status . . . is required to begin completing an Inmate Control Sheet (Form 420.F1) immediately upon reporting to the unit, and for the duration of the shift.
>
> 2. Security checks on each inmate in such status must be conducted every thirty (30) minutes on all inmates in Lock-In status.
>
> 3. The Living Unit Officer will record the times of all security checks on Form 420.F1 and sign their name after each notation . . . .
>
> [Ibid.]

Oliver agreed that she was unable to see appellant's eyes or tell if he was speaking or actually sleeping in the video. Oliver did not send an officer to wake up the appellant.

Oliver began writing her report on April 27, 2011, but she did not complete it until July 7, 2011. The PNDA was issued on June 10, 2011, prior to the completion of Oliver's report.

Gary MacDonald was at his desk doing paperwork on April 26, 2011, when it was alleged he was sleeping. When he observed the video in which he was alleged to have been sleeping, he realized that this incident occurred while he was having a conversation with and assessing the emotional state of an inmate. He did this often in an attempt to keep a good rapport with the inmates. Appellant's initial report did not mention this conversation, but rather sets forth that appellant will later advise what occurred. (R-44.) When Oliver would not accept such a report, appellant was advised to do a report that would make Oliver happy. Appellant did another report, but this report also did not mention the inmate conversation. (R-45.) Instead, this report states that he briefly dozed and went into a light sleep, then he woke up and was startled. (R-45.) Appellant was clear in his testimony that although he was not moving in the video, he was not sleeping at the time, but was talking to an inmate. The conversation lasted approximately twenty-five minutes. Although the video showed that appellant did not leave his chair for two hours that morning, appellant testified that he did the security checks from 2:30 a.m. to 4:30 a.m. on that morning, but he did not do the 5:00 a.m. or 5:30 a.m. checks. (R-42.) Control sheets were done at the time of the checks, and were not executed beforehand. (R-46.)

FINDINGS OF FACT

Given the apparent contradiction of the versions of events as offered by respondent's witness and appellant, it is my obligation and responsibility to again weigh the credibility of the witnesses in this matter in order to make a determination.

The respondent's evidence was the testimony of Oliver, the officer who viewed a recorded video version of the incident. However, the recording was from a camera located behind appellant's head, and his face could not be seen. Appellant cannot actually be seen sleeping in the video. Respondent's position is that the video showed that appellant did not leave his chair for two hours, and that does not match the report and statement given by appellant.

Appellant's position is changing. At first he declined to state a position in his initial report. In his second report he stated that he was sleeping lightly. In his testimony, appellant denied sleeping, instead stating for the first time that he was having a conversation with an inmate. For the foregoing reasons, I give no credit whatsoever to the testimony of appellant. Conversely, I **FIND** that Oliver's testimony was credible and that her testimony was consistent with her report.

The record in this incident includes documentary evidence and the testimony of the individuals who witnessed or had knowledge of the incidents they described. After carefully considering the testimonial and documentary evidence presented, and having had the opportunity to review the video on numerous occasions and to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following to be the relevant and credible **FACTS** in this matter: At approximately 4:35 a.m., appellant was sitting in a chair on the detention unit leaning back with no movement. The detention unit is an inmate housing unit which includes high-security inmates. The video camera remained on appellant for an extended period of time. There was no movement by appellant for approximately twenty-five minutes. Appellant was asleep. Appellant was required to perform walking security checks of each of the thirteen cells on the unit every thirty minutes, but he failed to do so.

At 4:59 a.m., appellant was observed on camera completing inmate control sheets in his log book. After completing the sheets, appellant rested his head on his hand at 5:05 a.m. and did not move again until 5:46 a.m. Appellant was again asleep. During the time period from 4:35 a.m. until 5:46 a.m., appellant did not get up from his chair and perform any security checks. At approximately 5:46 a.m., appellant completed entries in the log book indicating that he completed his required security

checks at 5:00 a.m. and 5:30 a.m. At 5:50 a.m., Oliver approached and spoke to appellant. She made an entry in the log book at 5:50 a.m. disputing that the 5:00 a.m. and 5:30 a.m. checks were completed.

The inmate control sheets also indicated that appellant did security checks at 5:00 a.m. and 5:30 a.m. for each inmate, as well as a security check at 6:00 a.m., a time which had not yet occurred. Oliver ordered appellant to complete an incident report explaining what had occurred. The first incident report submitted by appellant did not address the issues raised by Oliver and contained irrelevant or non-factual statements regarding appellant's actions. Oliver signed this first report but did not accept it. Later that day, appellant submitted a new report which addressed some of the issues raised by Oliver. In that report, appellant acknowledged that he "briefly dozed, or went into a light sleep. I woke up and was startled . . . ." Appellant did not state that he was speaking to an inmate during this time in his report.

LEGAL ANALYSIS

Based on the specifications, appellant was charged for the event on April 26, 2011, with a violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; violations of N.J.A.C. 4A:2-2.3(a)(1) and (7), incompetency, inefficiency or failure to perform duties and neglect of duty; and a violation of N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause, for violations of the Mercer County Table of Offenses and Penalties. These alleged violations relate to Section B-3—sleeping while on duty, and Section C-8—falsification: intentional misstatement of material fact in connection with work, employment, application, attendance, or in any record, report, investigation or other proceeding.

Appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee. Conduct unbecoming a public employee has been previously described. Given the false statements in the log book as well as on the inmate control sheets, appellant has not been truthful in his reports. This is conduct that adversely affects the morale of governmental employees or the efficiency of a public entity or conduct that has a tendency to destroy public respect for governmental

employees and confidence in public entities. I **CONCLUDE** that the respondent has met its burden of proof on this charge.

Appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause. Other sufficient cause is an offense for conduct that violates the implicit standards of good behavior which devolve upon one who stands in the public eye as an upholder of that which is morally and legally correct. This charge is based on Section B-3—sleeping while on duty, and Section C-8—falsification: misstatement of material fact in connection with work, employment, application, attendance or in any record, report, investigation or other proceeding. Appellant has not been truthful in his reports and he was asleep on the job. I **CONCLUDE** that the respondent has met its burden of proof on this charge.

Appellant was also charged with neglect of duty, in violation of N.J.A.C. 4A:2-2.3(a)(7). This section prohibits negligence in performing one's duty. Appellant failed to do required security checks at 5:00 a.m. and 5:30 a.m. Therefore, respondent has proven that appellant committed an act of neglect of duty, and I do so **CONCLUDE**.

Finally, appellant was charged a violation of N.J.A.C. 4A:2-2.3(a)(1) for incompetency, inefficiency or failure to perform duties. Appellant failed to do required security checks at 5:00 a.m. and 5:30 a.m. Therefore, respondent has proven that appellant failed to perform his duty, and I do so **CONCLUDE**.

3. Incident of October 12, 2010—Left Assigned Post

FACTUAL DISCUSSION

Testimony

Officer Lorenzo Ragnacci has been a correction officer at MCCC for five years. On October 12, 2010, Ragnacci was relieving Officer Bowser until approximately 2:50 a.m. After that time, Ragnacci reported to master control. (R-58.) Ragnacci signed in

to the log book in relief of Bowser at 12:45 a.m., 1:00 a.m., 1:30 a.m., 1:46 a.m., 2:00 a.m., and 2:30 a.m. (R-62; R-63.)

Officer James Chambers has been a correction officer at MCCC for six years. On October 12, 2010, at approximately 2:16 a.m., Chambers was sent by Sergeant Paris to cover the detention floor. Upon his arrival, Chambers observed the unit to be unmanned. He assumed the post until 3:30 a.m. (R-57.)

Officer James Chianese has been a correction officer at MCCC for eight years. In 2010 Chianese was assigned to Internal Affairs, at which time he was asked by Sergeant Paris and instructed by his supervisor to investigate the incident of October 12, 2010. Chianese reviewed all reports of the incident. (R-52; R-53, R-54; R-55; R-56; R-57; R-58; R-59; R-60; R-62; R-63.)

The incident involved appellant being unaccounted for, and when called on the radio by Sergeant Paris, appellant responded that he was "on the floor." Not seeing appellant, Paris sent Chambers to cover the floor. When Chambers arrived, the floor was unmanned.

Appellant has a radio and telephone at his disposal, and he cannot leave his post unless properly relieved. Appellant claimed he was sprayed by an inmate using a spray bottle filled with bleach, and while the inmate admitted spraying appellant, he stated that the spray was only water. Chianese did not ask for or check the bottle. At no time did appellant call a "code" because of the spraying incident, despite having a radio and telephone available to him. Appellant did not go to medical after the incident.

Appellant submitted three reports of the incident, two of which were different. (R-54; R-55; R-56.) Appellant claimed he was relieved by Ragnacci, but Chianese determined that there was no relief officer on the floor. Appellant did not return to the floor, and he did not make any entries to the log book. After completing his review, Chianese concluded that appellant violated the Employee Handbook, SOP 004, sections 1.02.11 and 1.04.4 (R-64), and Post Orders, SOP 238. Specifically, the Post Orders require the following:

> Officers will make appropriate log entries of daily activities in the Log Book for their assigned post. Refer to SOP 558 for appropriate Log notations.
>
> . . . .
>
> Correction Officers are required to submit accurate and complete written reports as directed, and to immediately report, both orally and in writing, all incidents of an unusual nature.
>
> . . . .
>
> Correction Officers shall not leave their assigned posts without being properly relieved unless authorized by the Administrator or designee.
>
> . . . .
>
> Officers will be familiar with, and enforce, all security procedures and policies to assure the safe confinement of inmates committed to the Correction Center.
>
> [R-65 at 3–4.]

Lieutenant Asa L. Paris was appellant's supervisor on October 12, 2010. Paris attempted to locate appellant on the detention unit, but could not find him. Paris attempted to contact receiving and discharge (R&D) by phone but nobody answered. Paris then went to the cameras to view the detention unit. When he could not locate appellant, Paris called appellant by radio. Appellant told Paris that he was on the floor. After checking the cameras again and not locating appellant, Paris ordered Chambers to the detention floor. Paris ordered appellant to master control. When appellant arrived, he told Paris that Ragnacci was relieving him. Appellant did not mention an incident involving bleach, he did not appear wet, and appellant did not ask for medical attention. Paris asked appellant why a "code" was not called, and appellant stated it was because he was looking for Paris. Paris called for Ragnacci but he was in another unit. The first mention of bleach by appellant was in his report. (R-54.) Officer Land did state that appellant's desk was wet. (R-60.) Paris reviewed all officer reports of the

matter and forwarded them to Bearden. (R-57; R-58; R-59; R-60.) Abandonment of a maximum-security post without notice to a superior is a serious security issue.

Captain Bearden reviewed the reports and drafted the charges for this incident. Bearden was unsure why he did not charge appellant with failing to call a "code."

Gary MacDonald was having a problem with an inmate when the inmate leaned out his food-port door and sprayed appellant with a liquid. The inmate said, "It's bleach." Appellant was in shock and he could smell bleach. His first thought was to get the bleach out of his eyes. Appellant saw a uniform out of the corner of his eye and he thought it was Ragnacci. This was an error. Without calling a "code," he rushed to the bathroom, where he stayed for approximately five minutes. When Paris called, appellant advised he was in R&D. Upon exiting the bathroom, appellant looked for Paris, but he did not call Paris on the radio. Appellant advised Officer Land of what had occurred, but appellant did not ask Land to make any calls for him. Appellant was advised to go to master control. Once at master control, appellant did not immediately advise Paris what had happened. Appellant first advised of the bleach and that he was relieved by Ragnacci in his report. (R-54.) Appellant did not later seek medical attention, because he felt better.

FINDINGS OF FACT

Given the apparent contradiction of the versions of events as offered by respondent's witnesses and appellant, it is my obligation and responsibility to once more weigh the credibility of the witnesses in this matter in order to make a determination.

The respondent's evidence was the testimony of several witnesses who were involved in some way with the incident. The witnesses were consistent in their recitation of what occurred. All confirm that appellant left his assigned duty without approval or authorization.

Appellant's position is that he was faced with an emergency, having been sprayed with bleach by an inmate. Although the existence of bleach has not been proven or disproven, appellant did not mention bleach initially to Paris, he did not call a "code," and he did not seek medical attention. The bleach theory was not raised until appellant drafted his report. In addition, it is troubling that appellant told Paris that he was on the R&D floor when he was not. For the foregoing reasons, I give no credit to the testimony of appellant. Conversely, I **FIND** that the respondent's witnesses were credible and that their testimony was consistent with their reports.

The record in this incident includes documentary evidence and the testimony of the individuals who witnessed or had knowledge of the incidents they described. After carefully considering the testimonial and documentary evidence presented, and listening to testimony and observing the demeanor of the witnesses, I **FIND** the following to be the relevant and credible **FACTS** in this matter: Appellant was sprayed by an inmate using a spray bottle filled with water. Appellant had a radio and telephone at his disposal, and he cannot leave his post unless properly relieved. Nevertheless, appellant proceeded to the bathroom because he thought he might have been sprayed by some other substance. Paris attempted to locate appellant on the detention unit, but could not find him. Paris attempted to contact R&D by phone but nobody answered. Paris then went to the cameras to view the detention unit. When he could not locate appellant, Paris called appellant by radio. Appellant told Paris that he was on the floor. After checking the cameras again and not locating appellant, Paris ordered Chambers to the detention floor. When Chambers arrived, the floor was unmanned. Paris ordered appellant to master control. When appellant arrived, he told Paris that Ragnacci was relieving him. This was untrue. Appellant did not mention an incident involving bleach, he did not appear wet, and appellant did not ask for medical attention. Paris asked appellant why a "code" was not called, and appellant stated it was because he was looking for Paris. Paris called for Ragnacci but he was in another unit.

LEGAL ANALYSIS

Based on the specifications, appellant was charged for the event on October 12, 2010, with a violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public

employee, and a violation of N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause, for violations of the Mercer County Table of Offenses and Penalties, Section D-6 and SOP 004 and SOP 238—violation of administrative procedures and/or regulations involving safety and security, and Section C-8 (Step 3) of the Table of Offenses and Penalties—falsification: intentional misstatement of a material fact in connection with work, employment, application, attendance, or in any record, report, investigation or other proceeding.

Appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee. Conduct unbecoming a public employee has been previously described. Given the false statements to his superior and the false statements in his report regarding being on the floor and being relieved by Ragnacci, appellant has not been truthful. This is conduct that adversely affects the morale of governmental employees or the efficiency of a public entity or conduct that has a tendency to destroy public respect for governmental employees and confidence in public entities. I **CONCLUDE** that the respondent has met its burden of proof on this charge.

Appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause. Other sufficient cause is an offense for conduct that violates the implicit standards of good behavior which devolve upon one who stands in the public eye as an upholder of that which is morally and legally correct. This charge is based on Section D-6, violation of procedures and/or regulations involving safety and security. Two Standards and Operating Procedures (SOPs) address an officer's obligation to remain at an assigned post. SOP 004, Employee Handbook, at Section 1.02.11 states:

> Officers shall not leave their assigned posts during a tour of duty except when authorized by proper authority.
>
> [R-64 at 4.]

SOP 238, Post Orders, states:

> Correction officers shall not leave their assigned post without being properly relieved unless authorized by the administrator or designee.
>
> [R-65 at 4.]

It is clear from testimony that appellant left his post without authorization and without relief. This resulted in a section of the jail not being under the direct surveillance of a correction officer.

Appellant violated procedure and regulations, and he endangered the safety and security of the facility. Appellant also falsified his report, in violation of Section C-8 (Step 3) of the Table of Offenses and Penalties—falsification: intentional misstatement of a material fact in connection with work, employment, application, attendance, or in any record, report, investigation or other proceeding. I **CONCLUDE** that the respondent has met its burden of proof on this charge.

4. Incident of August 16, 2011—Failure to Respond to Code

FACTUAL DISCUSSION

Testimony

Lieutenant Asa L. Paris was the area sergeant on August 16, 2011. A "code" was called at 1:07 a.m. via radio transmission while Paris was in the officer dining room. Appellant was on break at this time. As Paris was responding to the "code," he passed appellant in an upper hallway. Appellant was heading towards the officer dining room. Paris loudly advised appellant of the "code" because an officer on his break must still respond. Radios must be kept on during all breaks. Paris subsequently attempted to reach appellant by radio and public address system, which can be heard in the officer dining room. Appellant never responded to the "code," and the area was cleared. Appellant did return to the unit after approximately thirty-five minutes. Appellant's report

was false, as he was not in the bathroom when the "code" was called. (R-68.) Paris concluded that appellant violated Post Orders, SOP 238. Specifically, SOP 238, in the section titled "Security," requires the following:

> Officers will be familiar with and enforce, all security procedures and policies to assure the safe confinement of inmates committed to the Correction Center.
>
> . . . .
>
> Officers will effectively supervise the inmates to prevent fights, unrest, fires, escape, and all other acts contrary to the normal operations of the correctional facility.
>
> [R-65 at 3–4.]

Captain Bearden charged appellant with failing to respond to a "code," and with falsification. Bearden relied on reports of the incident and did not do an independent investigation. (R-67; R-68.)

Gary MacDonald was relieved for his break and he had to use the bathroom in the officer dining hall. He does not recall hearing a "code" or seeing or passing Paris. He did not see officers running towards a "code." He exited the bathroom and returned to his post after approximately thirty-five minutes. While he did have his radio in the bathroom, he turned the volume down, and he did not hear the public address system at any time.

FINDINGS OF FACT

Given the apparent contradiction of the versions of events as offered by respondent's witnesses and appellant, it is my obligation and responsibility to weigh the credibility of the witnesses in this matter in order to make a determination.

The respondent's evidence was the testimony of Paris, the officer who actually informed appellant of the "code." Paris also subsequently attempted to reach appellant by radio and public address system, which can be heard in the officer dining room.

Appellant did not state that Paris never told him of the "code," only that he could not remember if Paris told him. Appellant's report was false, as he was not in the bathroom when the "code" was called. For the foregoing reasons, I give no credit to the testimony of appellant. Conversely, I **FIND** that Paris's testimony was credible and that his testimony was consistent with his report.

The record in this incident includes documentary evidence and the testimony of the individuals who witnessed or had knowledge of the incidents they described. After carefully considering the testimonial and documentary evidence presented, and listening to testimony and observing the demeanor of the witnesses, I **FIND** the following to be the relevant and credible **FACTS** in this matter: On August 16, 2011, a "code" was called at 1:07 a.m. via radio transmission while Paris was in the officer dining room. Appellant was on break at this time. As Paris was responding to the "code," he passed appellant in an upper hallway. Appellant was heading towards the officer dining room. Paris loudly advised appellant of the "code" because an officer on his break must still respond. Paris subsequently attempted to reach appellant by radio and public address system, which can be heard in the officer dining room. Appellant never responded to the "code," and the area was cleared. Appellant did return to the unit after approximately thirty-five minutes. Appellant's report was false, as he was not in the bathroom when the "code" was called.

LEGAL ANALYSIS

Based on the specifications, appellant was charged for the event on August 16, 2011, with a violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and a violation of N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause, for a violation of the Mercer County Table of Offenses and Penalties Section D-6 and SOP 238 (Step 2)—violating administrative procedures and/or regulations involving safety and security, and Section C-8 of the Table of Offenses and Penalties (Step 5)—falsification: intentional misstatement of material fact in connection with work, employment, application, attendance, or in any record, report, investigation or other proceeding.

Appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee. Conduct unbecoming a public employee has been previously described.

Given the false statements in his report regarding being in the bathroom when the "code" was called, appellant has not been truthful. This is conduct that adversely affects the morale of governmental employees or the efficiency of a public entity or conduct that has a tendency to destroy public respect for governmental employees and confidence in public entities. I **CONCLUDE** that the respondent has met its burden of proof on this charge.

Appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause. Other sufficient cause is an offense for conduct that violates the implicit standards of good behavior which devolve upon one who stands in the public eye as an upholder of that which is morally and legally correct. This charge is based on Section D-6—violation of administrative procedures and/or regulations involving safety and security.

SOP 238, Post Orders, in the section titled "Safety," states:

> Officers will maintain a safe environment for inmates, other custodial personnel, and civilian personnel, as well as visitors to the institution.
>
> All corrections officers will respond to all Code situations while on breaks.
>
> [R-65 at 5.]

Appellant violated procedure and regulations, and he endangered the safety and security of the facility. Appellant also falsified his report, in violation of Section C-8 (Step 3) of the Table of Offenses and Penalties—falsification: intentional misstatement of material fact in connection with work, employment, application, attendance, or in any

record, report, investigation or other proceeding. I **CONCLUDE** that the respondent has met its burden of proof on this charge.

5. Incident of December 12, 2011—Left Assigned Post (Suicide Watch)

FACTUAL DISCUSSION

Testimony

Captain Richard Bearden drafted the original PNDA (R-69) after reviewing reports of Sergeant Robinson (R-73) and appellant (R-74). Although not charged with a violation of SOP 847 regarding one-to-one observation (R-75), appellant did not maintain constant observation of the inmate. Appellant violated SOP 004 (R-64) and SOP 238 (R-65) by his actions on December 12, 2011. Bearden wrote the charges after reading all reports thereon, but he did not review a video of this incident from the Star PC unit, or engage the assistance of a trained investigator. Even if appellant was correct that the inmate should not have had a foam cup in his cell, he still abandoned his post. In addition, appellant's report did not indicate that the inmate attempted to injure himself with the foam cup. (R-74.)

Officer Kevin Broadbent has been a correction officer at MCCC for twelve years. On December 12, 2011, Broadbent was on his post in the Star PC unit, at which time he was advised by appellant that the inmate that appellant was watching on suicide watch had a foam cup in his cell. This was not a concern, because the suicide-watch inmate was a self-mutilator who did not cause damage to himself with foam cups. In addition, the doctor's orders for the inmate did not preclude foam cups. Broadbent later observed appellant abandon his one-to-one suicide-watch post without proper relief. (R-71.) Broadbent was getting ready to be relieved of his duty for a break by Officer Talley. Officers who are being relieved must sign in and out of a log book, and discuss the situation with the relief officer. As Broadbent was getting ready to leave his post for his relief, he saw appellant walking out the door of the unit. Broadband inquired as to where appellant was going and appellant answered that he was going to master control. Appellant then left the unit, leaving no one-to-one officer on his suicide watch.

Broadbent called for the assistance of a sergeant, and he assumed appellant's one-to-one suicide watch while waiting for assistance. A one-to-one suicide-watch inmate should never be left alone. Broadbent did not leave for his relief until appellant came back to his post approximately ten minutes later.

Officer Aundrello Talley has been a correction officer at MCCC for seven years. She is currently a relief officer. On December 12, 2011, Talley came on the Star PC unit. She walked past appellant with the purpose of relieving Broadbent. She was receiving direction from Broadbent when she looked up and saw that appellant was gone. (R-72.) Talley did not hear appellant say where he was going. Broadbent asked where appellant went, and then he assumed appellant's one-to-one watch.

Lieutenant David A. Santitoro has been a correction officer at MCCC for twenty-one years. On December 12, 2011, appellant went to master control concerned about an inmate with a foam cup in his cell. Santitoro assumed that appellant was on a break, and he advised appellant to go to Sergeant Robinson about the problem. When Santitoro was advised that appellant had left his post, Santitoro proceeded to the Star PC unit. He saw Broadbent and Talley in front of the inmate's cell. Talley never engaged in a conversation with appellant, and although appellant claimed that Talley relieved him, he could not properly have thought that Talley was relieving him. Santitoro ordered appellant to prepare a report about the incident, but Santitoro never saw a report from appellant. (R-70.) Appellant could have used a radio in master control or a phone on the Star PC unit to contact a superior officer if he was concerned about the foam cup.

Gary MacDonald was working as a one-to-one suicide-watch officer in the Star PC unit at approximately noon on December 12, 2011. Appellant was familiar with the inmate he was watching and he knew the inmate would cut himself and insert items until he bled. There was a medical list of prohibited items and foam cups were not allowed. Appellant noticed that the inmate had a foam cup and he raised the issue with Broadbent. Broadbent was watching a game on television and was disinterested. Appellant asked Broadbent for a phone to call a supervisor and Broadbent refused. Talley arrived and spoke briefly with appellant about the foam cup, after which time she

proceeded to Broadbent. Appellant advised Talley and Broadbent that he would go up the chain of command. After receiving no response, appellant left his post to go to master control. On his way, appellant saw Santitoro, and he advised Santitoro of the situation. Santitoro advised appellant to get the foam cup, and appellant returned to his post. Appellant was aware that Talley was not his relief officer, but he knew that Talley could properly cover his post in relief.

FINDINGS OF FACT

Given the apparent contradiction of the versions of events as offered by respondent's witnesses and appellant, it is my obligation and responsibility to weigh the credibility of the witnesses in this matter in order to make a determination.

The respondent's evidence was the testimony of several witnesses who were involved in some way with the incident. The witnesses were consistent in their recitation of what occurred. Broadbent and Talley were clear in their testimony that Talley was relieving Broadbent and not appellant. As the two were discussing the details of the unit, appellant walked away from his watch without taking the necessary steps.

Appellant's position is that he asked Broadbent to make a phone call to a supervisor and Broadbent refused. Talley arrived and spoke briefly with appellant about the foam cup, after which time she proceeded to Broadbent. Appellant advised Talley and Broadbent that he would go up the chain of command. After receiving no response, appellant left his post to go to master control. I do not give credit to the testimony of appellant. Conversely, I **FIND** that the testimony of respondent's witnesses was credible and that their testimony was consistent with their reports.

The record in this incident includes documentary evidence and the testimony of the individuals who witnessed or had knowledge of the incidents they described. After carefully considering the testimonial and documentary evidence presented, and listening to testimony and observing the demeanor of the witnesses, I **FIND** the following to be the relevant and credible **FACTS** in this matter: On December 12, 2011,

Broadbent was on his post in the Star PC unit, at which time he was advised by appellant that the inmate that appellant was watching on a one-to-one suicide watch had a foam cup in his cell. This was not a concern, because the suicide-watch inmate was a self-mutilator who did not cause damage to himself with foam cups. In addition, the doctor's orders for the inmate did not preclude foam cups. Broadbent was getting ready to be relieved of his duty for a break by Officer Talley. Officers who are being relieved must sign in and out of a log book, and discuss the situation with the relief officer. As Broadbent was getting ready to leave his post for his relief, he saw appellant walking out the door of the unit. Broadband inquired as to where appellant was going and appellant answered that he was going to master control. Appellant then left the unit, leaving no one-to-one officer on his suicide watch. Broadbent called for the assistance of a sergeant, and he assumed appellant's one-to-one suicide watch while waiting for assistance. A one-to-one suicide-watch inmate should never be left alone. Broadbent did not leave for his relief until appellant came back to his post approximately ten minutes later. Appellant could have used a radio in master control or a phone on the Star PC unit to contact a superior officer if he was concerned about the foam cup.

LEGAL ANALYSIS

Based on the specifications, appellant was charged for the event on December 12, 2011, with a violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and a violation of N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause, for violating the Mercer County Table of Offenses and Penalties, Section D-6 (Step 3), and SOP 004 and SOP 238.

Appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee. Conduct unbecoming a public employee has been previously described.

Given that appellant abandoned his one-to-one suicide-watch post, he jeopardized the other correction officers, the inmate being watched, and the general public. The inmate might well have taken that opportunity to harm or even kill himself. This is conduct that adversely affects the morale of governmental employees or the

efficiency of a public entity or conduct that has a tendency to destroy public respect for governmental employees and confidence in public entities. I **CONCLUDE** that the respondent has met its burden of proof on this charge.

Appellant has also been charged with a violation of N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause, for violating the Table of Offenses and Penalties, Section D-6 (Step 3), and SOP 004 and SOP 238.

SOP 004, Employee Handbook, section 1.02.11, states:

> Officers shall not leave their assigned posts during a tour of duty except when authorized by proper authority.
>
> [R-64 at 4.]

Section 1.02.2 states:

> Officers . . . are responsible for compliance with . . . all current departmental rules, order and other directives . . . .
>
> [R-64 at 3.]

SOP 238, Post Orders, states:

> Correction officers shall not leave their assigned posts without being properly relieved unless authorized by the Administrator or designee.
>
> [R-65 at 4.]

Appellant left his unit, leaving no one-to-one officer on his suicide watch. He had not been properly relieved, and no superior officer authorized his action. As such, appellant violated Section D-6 (Step 3) and SOP 004 and SOP 238. I **CONCLUDE** that the respondent has met its burden of proof on this charge.

6. Incident of May 6, 2012—Failure to Follow Order to Take "Tents" Down

FACTUAL DISCUSSION

Testimony

Captain Richard Bearden drafted the PNDA. (R-76.) He also ordered appellant to prepare a report (R-79) in explanation of the incident.

Sergeant Gary Victor was the area supervisor in receiving and discharge during the 11:00-p.m.-to-7:00-a.m. shift on May 6, 2012. Appellant was working the same shift as a detention-floor officer, and appellant was the only officer on the floor. At the beginning of the shift, Victor ordered the appellant to have all inmates remove tents from their bunks. Tents are routinely made by inmates using sheets and blankets and the frame of the bunk. The erection of tents is against the rules of the MCCC.

Sometime between 3:00 a.m. and 4:00 a.m., Victor was contacted by Lieutenant Oliver, who was questioning why a tent was still up inside cells on the floor. Victor returned to the detention floor because the tent was still up and appellant did not follow his order. (R-77.) Victor agreed that the tent could have been taken down upon the initial order to remove it, and then reassembled prior to 3:00 a.m. However, security checks should be done every thirty minutes, and appellant did not contact Victor to advise him of the remaining erected tent, nor did appellant request assistance to enter the cell and remove the tent. The offending inmate eventually had to be removed from his cell in order to disassemble his tent. While out of the cell, the inmate became unruly and a "code six" was called to restrain the inmate. (R-78.)

Gary MacDonald was asked by Oliver at the beginning of his shift to see that two prisoner-made bunk bed tents were removed. Appellant did so, and all tents were taken down. However, when Oliver returned at the end of his shift, one inmate had placed his tent back up, and Oliver saw this.

FINDINGS OF FACT

Given the apparent contradiction of the versions of events as offered by respondent's witnesses and appellant, it is my obligation and responsibility to weigh the credibility of the witnesses in this matter in order to make a determination.

The respondent's evidence was the testimony of Victor, the officer who gave the order for all tents to come down. Respondent's position is that appellant did not enforce the removal of a tent, despite an order.

Appellant's position is that all tents were removed, but that an inmate later put a tent back up. I give no credit to the testimony of appellant. Conversely, I **FIND** that Victor's testimony was credible and that his testimony was consistent with his report.

The record in this incident includes documentary evidence and the testimony of the individuals who witnessed or had knowledge of the incidents they described. After carefully considering the testimonial and documentary evidence presented, and having had the opportunity to review the video on numerous occasions and to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following to be the relevant and credible **FACTS** in this matter: At the beginning of the shift, Victor ordered the appellant to have all inmates remove tents from their bunks. Tents are routinely made by inmates using sheets and blankets and the frame of the bunk. The erection of tents is against the rules of the MCCC.

Sometime between 3:00 a.m. and 4:00 a.m., Victor was contacted by Lieutenant Oliver, who was questioning why a tent was still up inside cells on the floor. Victor returned to the detention floor because the tent was still up and appellant did not follow his order. The tent was not taken down upon the initial order to remove it, and then reassembled prior to 3:00 a.m. However, even if it were, security checks should be done every thirty minutes, and appellant did not contact Victor to advise him of the erected tent, nor did appellant request assistance to enter the cell and remove the tent. The offending inmate eventually had to be removed from his cell in order to

disassemble his tent. While out of the cell, the inmate became unruly and a code six was called to restrain the inmate.

LEGAL ANALYSIS

Based on the specifications, appellant was charged for the event on May 6, 2012, with a violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and a violation of N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause, for violating the Mercer County Table of Offenses and Penalties, Section C-9 (Step 2)—insubordination: intentional disobedience or refusal to accept reasonable order, assaulting or resisting authority, disrespect or use of insulting or abusive language to a supervisor.

Appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee. Conduct unbecoming a public employee has been previously described.

Given the failure to follow the order of Victor, appellant was disruptive of governmental operations. This is conduct that adversely affects the morale of governmental employees or the efficiency of a public entity or conduct that has a tendency to destroy public respect for governmental employees and confidence in public entities. I **CONCLUDE** that the respondent has met its burden of proof on this charge.

Appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause. Other sufficient cause is an offense for conduct that violates the implicit standards of good behavior which devolve upon one who stands in the public eye as an upholder of that which is morally and legally correct. This charge is based on a violation of the Mercer County Table of Offenses and Penalties Section C-9 (Step 2)—insubordination: intentional disobedience or refusal to accept reasonable order, assaulting or resisting authority, disrespect or use of insulting or abusive language to a supervisor. Appellant intentionally disregarded the order of his supervisor, Victor. I **CONCLUDE** that the respondent has met its burden of proof on this charge.

7. Incident of August 27, 2012—Failure to Report to Minor Disciplinary Hearing

FACTUAL DISCUSSION

Testimony

Lieutenant David A. Santitoro was working as a shift commander on August 27, 2012. Appellant was working as a maintenance or construction officer, helping to escort workers through the jail. At approximately 1:15 p.m., Santitoro was advised that appellant needed to be relieved so that he could attend a disciplinary hearing. An officer was sent to relieve appellant at 1:20 p.m. At 1:35 p.m., Santitoro was told that appellant was not at his hearing, but, rather, was in his car. Santitoro contacted appellant by radio and advised him to proceed to master control. Appellant confirmed the order back to Santitoro. At 1:45 p.m., using a security camera, Santitoro observed appellant still in his car. Santitoro then paged appellant to master control. At 1:58 p.m., Santitoro observed appellant exit his car. Appellant came inside, walked past master control, and proceeded to his hearing. Santitoro later spoke to appellant and was told that appellant was on the phone with his lawyer. (R-81.) Appellant was never relieved for a break, but only to attend a hearing. (R-82.) After the hearing was completed, appellant proceeded to master control.

Gary MacDonald was assisting a maintenance crew when he was told to take a break. He did not have an officer to relieve him. Although he was unaware of a scheduled disciplinary matter that day, Officer McClain mentioned it to him, and appellant decided the break would be a good time to call his attorney. Appellant went to his car and called his attorney. Santitoro called appellant on the radio and advised him to proceed to master control. Appellant answered "10-4." Santitoro later contacted him again, but he was still on the phone. Upon completing the phone call, appellant went to master control. Because he was not told to go into master control, appellant walked by and waved to the officers inside. He proceeded to his hearing, and upon completion of the hearing, returned to master control.

FINDINGS OF FACT

Given the apparent contradiction of the versions of events as offered by respondent's witnesses and appellant, it is my obligation and responsibility to weigh the credibility of the witnesses in this matter in order to make a determination.

The respondent's evidence was the testimony of Santitoro. Santitoro was clear regarding the events of August 27, 2012. Respondent takes the position that appellant disobeyed a reasonable order of his superior.

Appellant's position is that he went to his car and called his attorney. However, appellant agreed that Santitoro called appellant on the radio and advised him to proceed to master control. Appellant answered "10-4," but he stayed in his car. Santitoro later contacted appellant again, but he was still on the phone. Upon completing the phone call, appellant finally went to master control. I do not credit the testimony of appellant. Conversely, I **FIND** that the testimony of respondent's witness was credible and that his testimony was consistent with his report.

The record in this incident includes documentary evidence and the testimony of the individuals who witnessed or had knowledge of the incidents they described. After carefully considering the testimonial and documentary evidence presented, and listening to testimony and observing the demeanor of the witnesses, I **FIND** the following to be the relevant and credible **FACTS** in this matter: Santitoro was working as a shift commander on August 27, 2012, while appellant was working as a maintenance or construction officer, helping to escort workers through the jail. At approximately 1:15 p.m., Santitoro was advised that appellant needed to be relieved so that he could attend a disciplinary hearing. An officer was sent to relieve appellant at 1:20 p.m. At 1:35 p.m., Santitoro was told that appellant was not at his hearing, but, rather, was in his car. Appellant was on the phone with his lawyer. Santitoro contacted appellant by radio and advised him to proceed to master control. Appellant confirmed the order back to Santitoro. At 1:45 p.m., using a security camera, Santitoro observed appellant still in his car. Santitoro then paged appellant to master control. At 1:58 p.m., Santitoro observed appellant exit his car. Appellant came inside, walked past master

control, and proceeded to his hearing. Appellant was never relieved for a break, but only to attend a hearing. After the hearing was completed, appellant proceeded to master control.

LEGAL ANALYSIS

Based on the specifications, appellant was charged for the event on August 27, 2012, with a violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; a violation of N.J.A.C. 4A:2-2.3(a)(2), insubordination; and a violation of N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause, for a violation of the Mercer County Table of Offenses and Penalties, Section C-9 (Step 3)—insubordination: intentional disobedience or refusal to accept reasonable order, assaulting or resisting authority, disrespect or use of insulting or abusive language to a supervisor.

Appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee. Conduct unbecoming a public employee has been previously described.

Given the failure to follow the order to go directly to his disciplinary hearing, appellant was disruptive of governmental operations. This is conduct that adversely affects the morale of governmental employees or the efficiency of a public entity or conduct that has a tendency to destroy public respect for governmental employees and confidence in public entities. I **CONCLUDE** that the respondent has met its burden of proof on this charge.

Appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause. Other sufficient cause is an offense for conduct that violates the implicit standards of good behavior which devolve upon one who stands in the public eye as an upholder of that which is morally and legally correct. This charge is based on a violation of the Mercer County Table of Offenses and Penalties Section C-9 (Step 2)—insubordination: intentional disobedience or refusal to accept reasonable order, assaulting or resisting authority, disrespect or use of insulting or abusive language to a supervisor. Appellant intentionally disregarded the order of his supervisor, Santitoro.

Appellant intentionally failed to report immediately to his disciplinary hearing and to master control. I **CONCLUDE** that the respondent has met its burden of proof on this charge.

8. Incident of September 3, 2012—Operation of the R & D Housing Unit

FACTUAL DISCUSSION

Testimony

Captain Richard Bearden drafted the original PNDA. (R-83.) The charges were later amended. Bearden agreed that inmates had rights to safe and clean cells and that officers could sometimes misunderstand orders. However, he also believed that misunderstanding orders was different from disobeying orders.

Lieutenant Michael Kownacki was the shift commander in receiving and discharge during the 11:00-p.m.-to-7:00-a.m. shift on September 3, 2012. Appellant was working the same shift as a detention-floor officer. Kownacki was present when Sergeant Fioravanti contacted appellant by telephone and advised appellant to not give the inmates any items and to open no food ports. This order was entered in a log book and it came directly from the warden. The order was required because inmates had for several days been flushing items down their toilets and causing flooding on the unit. In addition, cell 14 had a broken sprinkler and was now a dry cell. Nevertheless, the toilet in cell 14 could be remotely operated by an officer. Fioravanti was later contacted at approximately 12:15 a.m. by Officer Carter, who advised that appellant had opened the food port to cell 14 to give the inmate toilet paper. (R-86.) Appellant did not request permission to give the inmate in cell 14 toilet paper prior to undertaking that action.

Lieutenant Farah Fioravanti was working as a sergeant and as the area supervisor in receiving and discharge during the 11:00-p.m.-to-7:00-a.m. shift on September 3, 2012. Appellant was working the same shift as a detention-floor officer. With Kownacki present, Fioravanti contacted appellant by telephone at approximately 11:15 p.m. She advised appellant to not give the inmates any items and to open no

food ports. (R-84.) Officer Smith witnessed appellant providing toilet paper to the inmate in cell 14. (R-85.) Initially, appellant denied giving cell 14 any item. However, appellant later agreed that he gave the inmate toilet paper, but appellant explained that he did not believe the ban on items included toilet paper. (R-84 at 2; R-87.) At no time did appellant or any other officer ask for clarification from Fioravanti as to what items could or could not be given to inmates in their cells.

Gary MacDonald returned to work on September 3, 2012, after a few days off, and did not have a chance to read the log book. As such he did not know, nor was he told, that inmates were using the toilet paper to block their toilets and cause flooding. At the beginning of his shift, he had a conversation with Fioravanti, who told him not to give the inmates anything. Approximately fifteen minutes later, when an inmate asked for a roll of toilet paper, appellant looked in the cell, and not seeing many rolls, gave the inmate the toilet-paper roll. Appellant did not believe Fioravanti's ban extended to an item as critical as toilet paper. Fioravanti later asked appellant to retrieve the toilet paper, and he did so immediately, contrary to Fioravanti's claim that she retrieved the toilet paper. (R-84 at 3.) Appellant also admitted immediately to Fioravanti that he had given the inmate the toilet paper, and she was not truthful when she stated that appellant denied giving the inmate the toilet paper. Appellant did not purposefully violate the toilet-paper order of Fioravanti, and he agreed that he left many items out of his report. (R-87.) After this incident, appellant was reassigned to a suicide watch.

FINDINGS OF FACT

Given the apparent contradiction of the versions of events as offered by respondent's witnesses and appellant, it is my obligation and responsibility to weigh the credibility of the witnesses in this matter in order to make a determination.

The respondent's evidence was the testimony of Kownacki and Fioravanti. Kownacki is the officer who was present when Fioravanti gave the order personally to appellant to not give any items to the inmates. The order was based on inmates using toilet paper to clog toilets and flood cells. Appellant never requested clarification of the

order from Fioravanti. I also believe that Fioravanti was credible when she stated that appellant initially denied giving the inmate the toilet paper.

Appellant's position is that he did not believe Fioravanti's ban extended to an item as critical as toilet paper. Appellant never requested clarification of the order to determine if it included toilet paper because he believed toilet paper was an essential item. It is also troubling that appellant initially denied giving the inmate the toilet paper. While I give some credit to the testimony of appellant, his job is not to interpret orders but to follow them. Conversely, I **FIND** that Kownacki and Fioravanti were both credible and that their testimony was consistent with the proofs.

The record in this incident includes documentary evidence and the testimony of the individuals who witnessed or had knowledge of the incidents they described. After carefully considering the testimonial and documentary evidence presented, and listening to testimony and observing the demeanor of the witnesses, I **FIND** the following to be the relevant and credible **FACTS** in this matter: Lieutenant Fioravanti was working as a sergeant and as the area supervisor in receiving and discharge during the 11:00-p.m.-to-7:00-a.m. shift on September 3, 2012. Appellant was working the same shift. With Kownacki present, Fioravanti contacted appellant by telephone at approximately 11:15 p.m. She advised appellant to not give the inmates any items and to open no food ports. Appellant later provided toilet paper to the inmate in cell 14, in disregard of the prior order.

LEGAL ANALYSIS

Based on the specifications, appellant was charged for the event on September 3, 2012, with a violation of N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties; a violation of N.J.A.C. 4A:2-2.3(a)(2), insubordination; a violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; and a violation of N.J.A.C. 4A:2-2.3(a)(7), neglect of duty. Appellant was also charged with a violation of N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause, for a violation of the Mercer County Table of Offenses and Penalties Section C-9 (Step 4)—insubordination: intentional disobedience or refusal to accept reasonable order, assaulting or resisting authority,

disrespect or use of insulting or abusive language to supervisor, and Section B-2—performance, relating to neglect of duty, loafing, idleness or willful failure to devote attention to tasks which could result in causing danger to persons or property.

Appellant was charged with neglect of duty, in violation of N.J.A.C. 4A:2-2.3(a)(7). This section prohibits negligence in performing one's duty. Appellant was given an order to not give the inmates any items and to open no food ports. Appellant later provided toilet paper to the inmate in cell 14, in disregard of the prior order. Appellant's reason for violating the order was unacceptable. Appellant's conduct also violated the Mercer County Table of Offenses and Penalties relating to performance. His actions in giving the toilet paper amounted to neglect of duty that resulted, at a minimum, in a danger to respondent's property. Therefore, respondent has proven that appellant committed an act of neglect of duty, and I do so **CONCLUDE**.

Appellant was charged with a violation of N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties. Appellant was given an order to not give the inmates any items and to open no food ports. He failed to perform that duty. Therefore, respondent has proven that appellant failed to perform his duty, and I do so **CONCLUDE**.

Appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee. Conduct unbecoming a public employee has been previously described.

Given the failure to follow the order of Fioravanti, appellant was disruptive of governmental operations. This is conduct that adversely affects the morale of governmental employees or the efficiency of a public entity or conduct that has a tendency to destroy public respect for governmental employees and confidence in public entities. I **CONCLUDE** that the respondent has met its burden of proof on this charge.

Appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause. Other sufficient cause is an offense for conduct that violates the

implicit standards of good behavior which devolve upon one who stands in the public eye as an upholder of that which is morally and legally correct. This charge is based on a violation the Mercer County Table of Offenses and Penalties Section C-9 (Step 2)—insubordination: intentional disobedience or refusal to accept reasonable order, assaulting or resisting authority, disrespect or use of insulting or abusive language to a supervisor. Appellant intentionally disregarded the order of his supervisor, Fioravanti. I **CONCLUDE** that the respondent has met its burden of proof on this charge.

PENALTY

In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). However, where the charged dereliction is an act which, in view of the duties and obligations of the position, substantially disadvantages the public, good cause exists for removal. See Golaine v. Cardinale, 142 N.J. Super. 385 (Law Div. 1976), aff'd, 163 N.J. Super. 453 (App. Div. 1978); In re Herrmann, 192 N.J. 19 (2007). The question to be resolved is whether the discipline imposed in this case is appropriate.

Appellant has been removed for his actions on various dates. Appellant has had prior incidents during his career. A prior charge of neglect of duty resulted in a five-day suspension in October 2012. (R-93.) A prior charge of insubordination resulted in a five-day suspension in February 2012. (R-94.) A prior attendance charge resulted in a one-day suspension in November 2010. (R-95.) A prior charge of falsification resulted in a forty-five-day suspension on various dates. (R-96.) A prior charge of falsification resulted in a thirty-day suspension on various dates. (R-97.) A seven-day suspension from 2003 is not considered, as it is too remote in time. (R-98.)

1. Time and Attendance Charges Incidents

Applying the principle of progressive discipline, the penalties assessed by the hearing officer are affirmed. They are:

August 4, 2011	three-working-day suspension
November 14, 2012	four-working-day suspension
November 27, 2012	ten-working-day suspension
December 11, 2012	ten-working-day suspension

As to the December 18 through 27, 2012, absences, a doctor's note was provided showing that a heart condition prevented appellant from working during that ten-day period. The note does not excuse appellant's failure to appear for work, since employers have a legitimate right to expect that employees will attend work as scheduled. However, it does tend to mitigate against the removal sought. Weighing the circumstances for the December 18 through 27, 2012, unauthorized absences, the following penalty assessed by the hearing officer is affirmed as appropriate:

December 18–27, 2012	sixty-working-day suspension

2. Incident of April 26, 2011—Sleeping and Failing to Conduct Security Checks

The respondent has proven neglect of duty, sleeping on duty and falsification as a result of appellant not completing required security checks, sleeping instead of attending to his duties and falsifying his log entries to indicate that he completed security checks when he was, in fact, sleeping.

Falsification is a serious offense, and when combined with two other related infractions and appellant's prior disciplinary record, serious discipline is required. The pattern of falsification in these matters reveals that appellant will not hesitate to falsify records. As a result, he lacks the appropriate morals required of a correction officer. Removal is warranted.

3. Incident of October 12, 2010—Left Assigned Post

The respondent proved falsification under the Table of Offenses and Penalties, as well as conduct unbecoming a public employee by virtue of the falsification. Respondent also proved that appellant violated SOPs by leaving his assigned post. The respondent seeks removal.

Appellant's record of discipline is not good. Even if the prior record is considered in a light most favorable to the appellant, his record may be outweighed when the infraction at issue is of a serious nature.

In this matter, a review of the appellant's past disciplinary history is not necessary, since appellant's intentional falsification in reports relating to being relieved by another officer, as well as his falsification to Sergeant Paris as to his location, constitutes a serious violation. Additionally, law enforcement personnel are held to a higher standard of conduct than other public employees. Accordingly, removal of the appellant is justified.

4. Incident of August 16, 2011—Failure to Respond to "Code"

The respondent has proven a violation of the Table of Offenses and Penalties as to falsification by virtue of intentional misstatements in appellant's report both as to being in the bathroom when the "code" was called and that he responded to the "code" and assisted. Those intentional material misstatements in the report support a finding of conduct unbecoming a public employee. The respondent also proved that appellant violated SOP 238 by not responding to a "code," which requires all officers to do so. As a result of these violations, the respondent seeks removal.

Just as in the previous case, falsification is a serious offense. The falsification was committed to cover for appellant's failure to respond to an emergency, and that makes the falsification more egregious. The fact that Sergeant Paris saw appellant and specifically told him about the "code" makes appellant's falsification denial unbelievable.

Therefore, for the same reasons set forth in the preceding penalty discussions, removal of the employee is warranted.

5. Incident of December 12, 2011—Left Assigned Post (Suicide Watch)

The respondent has proven violation of administrative procedures and regulations involving safety and security and conduct unbecoming a public employee as to this incident. Appellant's conduct of walking off his suicide-watch post is a serious offense. As a result, the imposition of a penalty is considered without regard to prior-offense history and without utilizing the concept of progressive discipline. As previously noted, appellant's disciplinary record is not good. Under either the theory of progressive discipline or the serious-offense standard, removal of the employee is justified.

6. Incident of May 6, 2012—Failure to Follow Order to Take "Tents" Down

The respondent has proven insubordination by virtue of appellant not following orders to have inmate tents removed. That also constituted conduct unbecoming a public employee. Here the respondent seeks a fifteen-day suspension or a fine equal to fifteen days' pay.

As noted earlier, appellant has two prior major disciplinary actions involving insubordination. While remote in time, they show a pattern of disrespect and disregard for the chain of command. The nature of the offense, as well as prior discipline for insubordination, justifies the fifteen-day suspension sought by the respondent.

7. Incident of August 27, 2012—Failure to Report to Minor Disciplinary Hearing

The respondent has proven both insubordination and conduct unbecoming a public employee for appellant's disregard of an order to report for a disciplinary hearing and to report to master control. Appellant knew that he had to report, but instead went to his car. When contacted in his car as to his whereabouts, he again said that he would come to master control, but remained in the car. When told to report to master control, he walked by without stopping. There is no excuse for this conduct.

Generally, insubordination warrants a dismissal of the employee. Additionally, as previously noted, appellant had two prior major disciplinary actions for insubordination which resulted in significant suspensions. Given the appellant's prior major discipline and his flagrant disregard for orders, removal is warranted.

8. Incident of September 3, 2012—Operation of the R & D Housing Unit

The respondent has proven failure to perform duties, neglect of duty, insubordination and conduct unbecoming a public employee by virtue of appellant's failure to follow orders to withhold items from inmates. Appellant's blatant disregard of his obligation and the order directed to him is a serious offense. Because of that, his prior disciplinary record need not be considered. Since appellant cannot and will not accept direction and control from his supervisors, removal is not only warranted, but required.

Given the actions of appellant on various dates, removal of appellant from his position is necessary to maintain the diligence and integrity of the appointing-authority staff. Appellant has prior discipline, but regardless of the appellant's prior disciplinary record, appellant's inappropriate actions are serious and unprofessional. As a public employee, the appellant's actions must be above reproach.

After having considered all of the proofs offered in this matter, and the impact upon the institution of the behavior by appellant herein, and having given due deference to the concept of progressive discipline, I **CONCLUDE** that appellant's misbehavior was so significant as to warrant removal, which, in part, is meant to impress upon him, as well as others, the utter seriousness of his actions.

I **CONCLUDE** that the action of the appointing authority removing appellant for his actions should be **AFFIRMED**.

ORDER

I **ORDER** that the appeal of correction officer Gary MacDonald is **DENIED**, and that the disciplinary action of Mercer County removing appellant is **AFFIRMED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, 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.

May 19, 2014
DATE

EDWARD J. DELANOY, JR., ALJ

Date Received at Agency: May 19, 2014

Date Mailed to Parties: May 19, 2014

EJD/cb

APPENDIX

LIST OF WITNESSES

For respondent:

Richard Bearden
Alejandra M. Silva
Phyllis Oliver
Lorenzo Ragnacci
James Chambers
James Chianese
Asa L. Paris
Kevin Broadbent
Aundrello Talley
David A. Santitoro
Gary Victor
Michael Kownacki
Farah Fioravanti

For appellant:

Gary MacDonald

LIST OF EXHIBITS

For respondent:

R-1 Final Notice of Disciplinary Action, dated June 21, 2013
R-2 Preliminary Notice of Disciplinary Action, dated August 9, 2011
R-3 Preliminary Notice of Disciplinary Action, dated August 9, 2011, amended January 14, 2013
R-4 Attendance and Overtime Record, dated August 3, 2011
R-5 Timekeeper Report for August 3, 2011
R-6 Time and Attendance Calendar for 2011
R-7 Preliminary Notice of Disciplinary Action, dated December 24, 2012

R-8 Attendance and Overtime Record, dated November 13, 2012

R-9 Timekeeper Report for November 13, 2012

R-10 Time and Attendance Calendar for 2012

R-11 Preliminary Notice of Disciplinary Action, dated December 28, 2012, amended January 14, 2013

R-12 Attendance and Overtime Record, dated November 26, 2012

R-13 Timekeeper Report for November 26, 2012

R-14 Time and Attendance Calendar for 2012

R-15 Preliminary Notice of Disciplinary Action, dated January 1, 2013, amended January 14, 2013

R-16 Timekeeper Report for December 10, 2012

R-17 Attendance and Overtime Record, dated December 10, 2012

R-18 Time and Attendance Calendar for 2012

R-19 Preliminary Notice of Disciplinary Action, dated January 7, 2013, amended January 14, 2013

R-20 Attendance and Overtime Record, dated December 17, 2012

R-21 Timekeeper Report for December 17, 2012

R-22 Attendance and Overtime Record, dated December 18, 2012

R-23 Timekeeper Report for December 18, 2012

R-24 Timekeeper Report for December 19, 2012

R-25 Attendance and Overtime Record, dated December 22, 2012

R-26 Timekeeper Report for December 22, 2012

R-27 Timekeeper Report for December 23, 2012

R-28 Attendance and Overtime Record, dated December 24, 2012

R-29 Timekeeper Report for December 24, 2012

R-30 Timekeeper Report for December 25, 2012

R-31 Attendance and Overtime Record, dated December 26, 2012

R-32 Timekeeper Report for December 26, 2012

R-33 Time and Attendance Calendar for 2012

R-34 Letter from Personnel to Officer MacDonald, dated February 22, 2011

R-35 Letter from Personnel to Officer MacDonald, dated September 1, 2011

R-36 Letter from Personnel to Officer MacDonald, dated October 20, 2011

R-37 Letter from Personnel to Officer MacDonald, dated May 23, 2012

R-38 FMLA Designation Notice, dated May 23, 2012

R-38B FMLA Designation Notice, dated October 20, 2011

R-39 FMLA Notice of Eligibility and Rights and Responsibilities, dated May 23, 2012

R-39B FMLA Notice of Eligibility and Rights and Responsibilities, dated October 20, 2011

R-40 Preliminary Notice of Disciplinary Action, dated June 10, 2011, amended February 14, 2013

R-41 Lieutenant Oliver Internal Affairs Report, dated July 7, 2011

R-42 A-Tour Log Book, dated April 26, 2011, Officer MacDonald

R-43 Lieutenant Paris Incident Report, dated April 26, 2011

R-44 Officer MacDonald Incident Report, dated April 26, 2011

R-45 Officer MacDonald Incident Report, dated April 26, 2011

R-46 Inmate Control Sheets

R-47 SOP 419: Administrative Segregation—Living Units

R-48 SOP 420: Lock-In Status Inmates—Required Provisions

R-49 SOP 240K: Living Unit Post Orders—R&D Detention/Administrative Segregation Living Unit

R-50 Video

R-51 Preliminary Notice of Disciplinary Action, dated December 29, 2010

R-52 Sergeant Paris Incident Report, dated October 12, 2010

R-53 Sergeant Paris Report for Warden, dated October 12, 2010

R-54 Office MacDonald Incident Report, dated October 12, 2010, re: sprayed with bleach

R-55 Officer MacDonald Incident Report, dated October 12, 2010, re: left unit briefly

R-56 Officer MacDonald Incident Report, dated October 12, 2010, re: verbally reprimanded

R-57 Officer Chambers Incident Report, dated October 12, 2010

R-58 Officer Ragnacci Incident Report, dated October 12, 2010

R-59 Officer Bowser Incident Report, dated October 12, 2010

R-60 Officer Land Incident Report, dated October 12, 2010

R-61 Investigator Chianese Internal Affairs Report, dated December 17, 2010

R-62 Log Book, dated October 12, 2010, A-Tour, Officer Bowser
R-63 Log Book, dated October 12, 2010, A-Tour, Officer MacDonald
R-64 SOP 004: Employee Handbook
R-65 SOP 238: Post Orders Correction Officer (General)
R-66 Preliminary Notice of Disciplinary Action, dated September 8, 2011
R-67 Lieutenant Paris Incident Report, dated August 16, 2011
R-68 Officer MacDonald Incident Report, dated August 16, 2011
R-69 Preliminary Notice of Disciplinary Action, dated December 14, 2011
R-70 Lieutenant Santitoro Incident Report, dated December 12, 2011
R-71 Officer Broadbent Incident Report, dated December 12, 2011
R-72 Officer Talley Incident Report, dated December 12, 2011
R-73 Sergeant Robinson Incident Report, dated December 12, 2011
R-74 Officer MacDonald Incident Report, dated December 12, 2011
R-75 SOP 847: One-on-One Coverage
R-76 Preliminary Notice of Disciplinary Action, dated May 24, 2012
R-77 Sergeant Victor Incident Report, dated May 6, 2012
R-78 Officer MacDonald Incident Report, dated May 6, 2012
R-79 Officer MacDonald Incident Report, dated May 21, 2012
R-80 Preliminary Notice of Disciplinary Action, dated September 3, 2012
R-81 Lieutenant Santitoro Incident Report, dated August 28, 2012
R-82 Officer MacDonald Incident Report, dated August 27, 2012
R-83 Preliminary Notice of Disciplinary Action, dated September 26, 2012
R-84 Lieutenant Fioravanti Incident Report, dated September 3, 2012
R-85 Officer Smith Incident Report, dated September 3, 2012
R-86 Officer Carter Incident Report, dated September 3, 2012
R-87 Officer MacDonald Incident Report, dated September 3, 2012
R-88 Mercer County Table of Offenses and Penalties
R-89 SOP Training Check-Off List signed by Officer MacDonald
R-90 SOP Manual Acknowledgement Form
R-91 SOP Sign-Off Sheet signed by Officer MacDonald
R-92 SOP Update Acknowledgement signed by Officer MacDonald
R-93 Final Notice of Minor Disciplinary Action, dated October 20, 2012
R-94 Final Notice of Minor Disciplinary Action, dated February 21, 2012

R-95 Final Notice of Minor Disciplinary Action, dated November 15, 2010

R-96 Final Notice of Major Disciplinary Action, dated September 26, 2007

R-97 Final Notice of Major Disciplinary Action, dated September 26, 2007

R-98 Final Notice of Major Disciplinary Action, dated April 23, 2003

For appellant:

A-1 Doctor's note from Ronald A. Felipe, M.D., for Officer MacDonald, dated January 21, 2013

A-2 St. Francis Medical Center Medical Discharge Instructions for Officer MacDonald, dated December 19, 2012

A-3 Doctor's note from Robert Hogan, D.O., for Officer MacDonald, dated December 21, 2012

A-4 Not in evidence

For tribunal:

T-1 Final Notice of Disciplinary Action filed on June 21, 2013