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**STATE OF NEW JERSEY**

**DECISION OF THE  
CIVIL SERVICE COMMISSION**

In the Matter of Willie Smith  
Juvenile Justice Commission

CSC DKT. NO. 2012-3264  
OAL DKT. NO. CSV 7319-12

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**ISSUED: DECEMBER 17, 2015**      **BW**

The appeal of Willie Smith, Assistant Superintendent Residential Group Center, Juvenile Justice Commission, demotion to Youth Work Supervisor, on charges, was heard by Administrative Law Judge Robert Bingham II, who rendered his initial decision on November 2, 2015. No exceptions were filed.

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 December 16, 2015, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision to reverse the demotion.

**ORDER**

The Civil Service Commission finds that the action of the appointing authority in demoting the appellant to Youth Work Supervisor was not justified. Accordingly, the appellant should be immediately reinstated to the title of Assistant Superintendent Residential Group Center. Further, the appellant is entitled to differential pay from the date of his demotion to the date of his reinstatement to Assistant Superintendent Residential Group Center.

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

*N.J.A.C.* 4A:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of counsel fees. However, under no circumstances should the appellant's return to the Assistant Superintendent Residential Group Center title be delayed pending resolution of any potential counsel fee dispute.

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

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
DECEMBER 17, 2015



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and  
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**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. CSV 7319-12

AGENCY DKT. NO. 2012-3264

**IN THE MATTER OF WILLIE SMITH,  
JUVENILE JUSTICE COMMISSION.**

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**Mark Fury, Esq.**, for appellant Willie Smith

**Robin Josey**, Regional Administrator, for respondent Juvenile Justice  
Commission pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: May 4, 2015

Decided: November 2, 2015

BEFORE **ROBERT BINGHAM II**, ALJ:

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

Appellant Willie Smith appeals a demotion by the Juvenile Justice Commission (respondent or JJC) by Final Notice of Disciplinary Action (FNDA) dated April 17, 2012,<sup>1</sup> charging neglect of duty and other sufficient cause<sup>2</sup> for alleged failure to supervise juvenile program residents. The Civil Service Commission transmitted the appeal to the

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<sup>1</sup> The JJC's FNDA in this matter (J-1) derives from a departmental hearing on March 8, 2012, in conjunction with its letter to appellant dated April 17, 2012.

<sup>2</sup> In particular, appellant was charged, under N.J.A.C. 4A:2-2.3(a)(11), with violation of JJC Community Programs Policy 9.01, Juvenile Supervision. N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause, was recodified as N.J.A.C. 4A:2-2.3(a)(12) effective March 5, 2012.

Office of Administrative Law (OAL), where it was filed on May 31, 2012, 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 February 4, and April 20, 2015, and the record remained open at the conclusion of the proceedings. The record closed on May 4, 2015, following the receipt of post-hearing submissions. Extensions were granted until November 2, 2015, for issuance of this decision.

### **FACTUAL DISCUSSION**

Appellant is a fifteen-year JJC employee and currently an assistant superintendent, residential group center (RGC), within the JJC's Office of Community Programs (OCP). The administrative hierarchy within the OCP is: director; regional administrator; superintendent, RGC; and assistant superintendent, RGC. By way of background, appellant was hired as a youth worker in October 2000 and he became permanent in that title in April 2001. He subsequently received regular appointments as: senior youth worker in April 2002; youth work supervisor in April 2005; and, his current position, assistant superintendent, RGC, in December 2007. (R-17.)

The job specification for assistant superintendent, RGC, (R-18) indicates that, under direction of a superintendent, RGC, the assistant superintendent, RGC, assists in managing the staff and activities of a residential group center for the care and custody of juvenile offenders; the treatment, social service, education and medical programs for residents; and the preservation of public safety; or, under the direction of a regional program supervisor or other supervisory official, when assigned, oversees the staff and activities of a day program; and does other related duties. By way of example, an assistant superintendent RGC assumes responsibility for the residential group center in the absence of the superintendent, RGC, and the management of staff and activities is according to established standards, policies, procedures and pertinent laws governing juvenile offenders.

Since December 2007, appellant has served as assistant superintendent, RGC, at DOVES, one of five residential programs currently run by the JJC. DOVES is a community home for female secure-care residents, and it has a substance-abuse

program for individuals ages sixteen to twenty-one. It is housed in a large and secure facility. The first floor contains offices and the second floor houses the residents' dorms. The second floor's D-Wing has dorm rooms along a common corridor that has a youth-worker station at either end, namely, D-1 and D-2. As discussed below, residents are classified relative to four supervision levels, based upon factors such as behavior, psychological/psychiatric, and/or medical profile.

During an 11:00-p.m.-to-7:00-a.m. shift (overnight shift) in February 2011 and again in April 2011, appellant worked at DOVES with one other staff person present. Appellant's supervisor, superintendent, RGC, Diane Epps, was on vacation at the time of the February overnight shift, but she did a spot check during the April overnight shift and found appellant in a first-floor office and the other staff member stationed on the second floor supervising the residents. On each occasion, logs were kept relative to the juvenile residents' status and no incidents or injuries occurred.

JJC's Juvenile Supervision Policy 9.01 (Policy 9.01), effective November 2, 2009, indicates that the facility administrator shall ensure that each juvenile is properly supervised and that each juvenile shall be assigned an appropriate supervision status. It outlines four levels of supervision status (SS): SS1—standard supervision; SS2—increased supervision; SS3—extra precaution; and SS4—close watch.<sup>3</sup> Supervision of an SS2 resident requires a "heightened awareness of the juvenile's activities and behavior." (R-14.) Supervision of an SS3 resident requires that an assigned staff member "keep the juvenile under continuous visual supervision," which means that "the juvenile shall be seen at all times and a reasonably close distance (i.e., in the same room or area) shall be maintained by the assigned staff member." (Ibid.) The specified staff member shall document his or her constant supervision of an SS3 or SS4 resident

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<sup>3</sup> SS1 status applies to juveniles who: (a) exhibit positive behaviors; (b) demonstrate appropriate participation in the program; and (c) comply adequately with program rules and expectations. SS2 status applies to juveniles who: (a) are newly admitted to the program; (b) exhibit minor negative behaviors; and (c) exhibit poor compliance with rules. SS3 status applies to juveniles who: (a) exhibit unusual, erratic or alarming behavior; (b) may pose a risk to self or others; and (c) are at risk for escape. SS4 status applies to juveniles who: (a) exhibit out-of-control behavior and may require restraint; (b) are actively attempting to harm self or others; (c) are experiencing a serious medical emergency; and (d) normally imply that outside help (e.g., crisis intervention, ambulance or police) has been requested.

at regular fifteen-minute intervals. Practice guidelines for juvenile supervision include positioning oneself to ensure maximum visibility and coverage.

The JJC's Juvenile Supervision Policy 9.01 (R-16), as revised on November 18, 2003 (original date January 1, 1999), (R-16) indicates that juvenile supervision in JJC programs requires the "careful and vigilant" attention of staff members and that each juvenile shall be assigned an appropriate supervision status. It outlines the same four levels of supervision status and further indicates that "staff coverage assignments shall correspond with the nature of the activity or area assigned and shall provide for appropriate supervision of juveniles in various program activities and components." Supervision of SS2 residents requires a cognizance of the "location and behavior of juveniles at all times." Supervision of SS3 residents requires "direct close supervision . . . having a specified staff member assigned to him or her, and keeping him or her within the immediate area and under continuous visual supervision of the assigned staff member at all times." (*Ibid.*) The same definition of continuous visual supervision and the same documentation requirements for SS3 or SS4 residents apply.

The JJC ultimately charged appellant with neglect of duty and other sufficient cause, specifically, violation of JJC Community Programs policy 9.01, Juvenile Supervision, for alleged failure to supervise the juvenile program residents on February 17, and April 7, 2011. According to the specifications set forth in the charges, on those dates,<sup>4</sup> while scheduled to work the overnight shift, appellant "remained on the first floor while leaving one staff member alone to supervise the residents, which is a direct violation of Community Program practices . . . [and] standard operating procedures." Such actions are alleged to "represent a disregard for the security of the staff, residents and surrounding community as well as a violation of JJC community program policy and constitutes neglect of duty." The specifications further state that, based upon prior discipline, "a demotion to Youth Work Supervisor is necessary to maintain operational efficiency." (J-1.)

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<sup>4</sup> As acknowledged by the parties, the FNDA erroneously lists the date of March 17, 2011, in the specification of the charges.

I **FIND** as **FACT** all of the above, as to the undisputed background facts and the existence of the applicable policies.

### Testimony

**Kenyon Alexander**, senior youth worker and seventeen-year JJC employee, testified that on February 17, 2011, while assigned to the JJC's Albert Elias program (Elias) he responded to a call from Elias's superintendent, Pat Kepple, to cover the overnight shift at DOVES due to a staffing shortage. Upon arrival, he relieved a Ms. Hope, and he and appellant were then the only staff present. While Alexander worked on DOVES's upstairs unit that housed residents, appellant was downstairs in his office for most of the shift. Specifically, Alexander was posted on the second floor's D-1 wing, where another staff member would also be posted generally. At the time, there were eight residents, one of whom was on extra-precaution (EP) status requiring constant supervision.

Alexander had not previously worked at DOVES, and was not briefed by appellant as to the all-female DOVES unit or as to any resident being on EP status. Alexander nonetheless monitored an EP resident, T.C., who went to bed at 11:15 p.m. and slept through the night, awakening at 5:30 a.m. (R-7; R-8.) He also regularly monitored the other residents, who remained in bed through the night. (R-3.) Appellant came upstairs to check on Alexander five or six times throughout the night, never staying more than ten minutes. It was normal protocol, however, that two people be stationed on a floor sharing supervision of the residents for each shift.

There were no incidents during the shift. Nonetheless, for reasons unknown, Alexander was asked by superiors to write a report, and he generated a report dated March 17, 2011. (R-4; R-5.)<sup>5</sup> It indicated that appellant had been stationed in his office

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<sup>5</sup>Alexander believes that the request had come from superintendent Antar Simmons, who indicated that "higher ups" were asking for a report. Initially, Alexander's report erroneously listed the incident date as March 17, and a second report (R-5) was generated to correctly reflect an incident date of February 17, 2011.

downstairs, "but came upstairs all throughout the night to check on [Alexander] and the girls." (Ibid.)

Alexander agreed that this was an unusual situation because (1) normally, the second staff member is present in addition to the assistant superintendent; he never had a shift with only an assistant superintendent, and (2) he has never been called to another facility like that in his seventeen years of JJC employment.

**Robert Calderon, Sr.**, youth worker and twenty-year JJC employee, testified that on April 7, 2011, he worked the overnight shift at DOVES along with appellant. (R-9; R-10.) He had worked at DOVES for two years, mainly on the night shift. As stated in his incident report dated April 7, 2011, (R-11) appellant debriefed Calderon at the beginning of the shift and then went downstairs to handle paperwork. Calderon then staffed the floor alone, but appellant called upstairs to check on him. Assistant superintendent Diane Epps "popped up that night," as she sometimes would come in to check on the unit.

According to Calderon, the usual staffing pattern involves two staff posted at youth-worker stations, one at the D-1 wing and the other at the opposite D-2 wing, where he was that night. The two staff generally rotate patrolling the connecting hall, where they would check the residents' bedrooms. In his experience, there are at least two overnight staff on the floor all night. On the night of April 7, the count reflected thirteen residents, of whom S.B. and Y.E. were on extra-precaution status, and one staff would need to be in close proximity to S.B.<sup>6</sup> From his vantage point, he could see the whole hallway, rather than into each door. Calderon completed juvenile monitoring forms for S.B. (R-13A) and Y.E. (R-13B) that indicate that both juveniles went to bed at 11:15 p.m. and remained there through the night.

Calderon agreed that there had been a staffing shortage that night. He also agreed that when a supervisor was the second staff person on the floor, that supervisor

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<sup>6</sup> S.B. had behavior issues when she was housed on another unit (Hayes) before arriving at DOVES. Y.E. was on extra-protection status for an initial two- or three-week monitoring period because she had just come onto the DOVES unit.



would sometimes go downstairs to complete paperwork, but, in his experience, was never gone for more than a half hour.

**Diane Epps**, a JJC superintendent currently assigned with the OCP, testified that her role at DOVES in February and April 2011 was to supervise and oversee residents and staff activities. Epps supervised one assistant superintendent; three youth worker supervisors; approximately three substance-abuse assistants; six or seven senior youth workers; and perhaps one youth worker. All staff were responsible to supervise the residents, if in the area. And there were no less than twenty people that could be called in at any time to cover each of the three shifts and supervise residents. According to Epps, appellant had twice left one staff person alone to supervise residents on the second floor at DOVES, leading to the instant charges.

On February 17, 2011, appellant was scheduled to work overnight at DOVES. Epps learned from Pat Kepple, superintendent at the Elias program, that on that date Alexander was asked to work at DOVES, where he supervised the second floor while appellant worked on the first floor and periodically checked on him.<sup>7</sup> The acceptable level of supervision for the overnight shift was to have two people supervising the residents on the second floor, one at D-1 (left side) and the other at D-2 (right side). (R-5A.) The staff perform staggered checks, at fifteen-minute intervals, of the residents' status. According to Epps, this protocol was in effect for at least six or seven years pursuant to the directive of the director of Community Programs. No circumstances allow only one person to supervise upstairs and, on this occasion, Alexander should have been posted at D-1 and appellant at D-2. At the time, there was one girl on extra-precaution status. (R-3; R-8.)

On April 7, 2011, Calderon worked night shift, on the second floor, and appellant did paperwork on the first floor and checked on him periodically. (R-11.) According to Epps, that constituted a policy breach because appellant did not adhere to the standard of two people supervising residents on the second floor. Referencing her notes (R-26), Epps testified that she had neither scheduled nor approved appellant to work that

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<sup>7</sup> Epps has no personal knowledge regarding February 11, as she was on vacation at the time. She only knew that Alexander called Keppel, and she received a call from her director, Robert Montalbano.

overnight shift because floor coverage would "detract." Rather, he had scheduled himself to work that night, and she arrived at approximately 3:30 a.m. for an overnight check and found him working in the office. He said that he had scheduled himself to cover overnight because of staff training, and that he had not been upstairs, where Epps found Calderon at the D-1 wing. Calderon told her that he had been upstairs alone through the night but appellant checked on him. Calderon should have been posted at D-1 and another worker at D-2. (R-12.)

At the time, Policy 9.01 (R-14) was in effect and it contained four levels of supervision: standard (SS1), increased (SS2), extra precaution (SS3), and close watch (SS4). Further, staffing patterns were discretionary for the 7:00-to-3:00 shift, when daily activities impacted the level of supervision, and the 3:00-to-11:00 shift, when there were more treatment groups. However, the staffing of overnight shifts is not discretionary. At the time, there were two residents on EP status: S.B., who had prior behavioral problems and needed SS3-level supervision with continual visual surveillance in close proximity, and another new resident. (R-10; R-13.)

The staffing error at DOVES created concerns, specifically, the potential for residents' reluctance or even false accusations involving a new male staff member. According to Epps, it should not have happened, and appellant should have known better as an administrator who, like staff, must follow policy. After the April 7 incident, Epps met with appellant and established a sixty-day plan to address a number of employment issues.<sup>8</sup> Epps subsequently testified that she had a conversation with appellant regarding the staffing issue, but did not recall exactly when. According to her, he knew the standard, though she admittedly had not given it to him.

On cross-examination, Epps testified that she is not aware of any amendments to Policy 9.01 (R-14) since its effective date in 2009.<sup>9</sup> Admittedly, nowhere does it state that two youth workers are required to staff overnight shifts. Further, she could not

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<sup>8</sup> According to Epps, there had been issues with reporting times, late arrivals, and callout patterns.

<sup>9</sup> Epps described R-14 as a policy rather than an advisory, though noting its reference to being a "set of guidelines" as well as a "policy." (R-14 at 4.) However, practically speaking, it was more of a guideline. For instance, two staff could not supervise three EPs unless they were put in the same area.

identify any such written standard. Further, Policy 9.01 also does not state that each juvenile (with an EP status) must have his or her own staff person. According to Epps, the staff should sit at the (EP) resident's door, but she is aware that many do not. Admittedly, it is possible to have three or more residents on EP status, though she does not recall such an occurrence.

Further, staff could work a double shift any time, and if no staff was available an administrator on duty would cover. In this matter, the pool of available staff was so small that a different facility had to be "tapped" to get someone to cover. Epps agreed that the residents were not left unsupervised, but insisted there still should have been two staff members supervising them.

Admittedly, appellant did what he was supposed to do and acquired another staff person to cover the staff shortages. And it is indeed unusual to have to ascend two supervisory levels to cover a staff shortage. On February 17, all of the responsible senior supervisors were made aware of DOVES's staff shortfall. Also, Epps had asked appellant to handle staffing in April, but does not recall asking him to do so two weeks in advance. As assistant superintendent, appellant would not be working a youth worker position absent something extraordinary; normally, two additional staff would be assigned the night shift. But if an administrator did provide coverage as a youth worker in an abnormal circumstance, he or she has "a job to do." Epps agreed that appellant did not provide any false information regarding staffing and did not try to deceive her.

Epps acknowledged a number of errors and irregularities in the reports. The report that Y.E. was new to the program in February 2011 (R-13B at 2) is erroneous because she came to the program in April 2011. Yet, according to Epps, it is not uncommon for such a mistake to occur.<sup>10</sup> Epps does not know who wrote that report, although it was initialed by Calderone. Admittedly, it is an unreliable record. Yet, according to Epps, she can rely upon it because it was submitted by the youth worker at the time. Epps also could not account for the identity of a person indicated on the February 17 log sheet (R-2) as working a double shift (7:15 a.m. to 11:15 p.m.).

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<sup>10</sup> Notably, another mistake as to the date of February 18, rather than February 17, should not happen.

Further, it was not unusual for an incident report to be filled out after the fact, although policy required it at the end of the shift. But it can be unusual for an incident report to be produced thirty days later (as was Alexander's).<sup>11</sup> Also, Epps is "comfortable" stating that the Juvenile Monitoring Form (R-8) is an accurate document despite an erroneous date. Under further scrutiny, Epps stated that she could indeed accept as accurate a document with such inaccurate information.

**Herbert White**, a JJC superintendent, testified that in his former position as JJC regional administrator, he oversaw the five current juvenile programs, including DOVES. White testified as to appellant's tenure with the JJC and, referencing a record of staff training completed on February 16, 2001 (R-15), noted that appellant attended staff training and completed an intensive course relative to policies and procedures.

White testified that the juvenile-supervision policy that was in effect between 1999 and 2003 (R-16) is substantially the same in content, regarding supervision status levels, as that which is taught and trained at the academy (R-14). The latter policy was in effect when the subject incidents occurred and when the Preliminary Notice of Disciplinary Action recommending appellant's demotion was issued. Under Section 3A (of Policy 9.01), relative to procedures, each program must provide two staff members (for supervision) at all times during the overnight shift, except for short intervals such as a bathroom break or escorting a resident downstairs. Regular breaks had been removed from the midnight shift due to the need to have two staff members on the floor.

According to the pertinent job specification, responsibilities of a superintendent, residential, include the safety and security of building residents, as well as the duties of supervisor in the supervisor's absence. He or she is a role model who is responsible to know and follow policies and procedure and ensure that they are followed by others.

White was involved in securing Alexander to cover the staff shortfall at DOVES (in February). (R-4.) He had received a call from either Epps or appellant and

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<sup>11</sup> If a circumstance warranting a report were discovered some 30 days later, Epps would report it to her regional administrator and ask the staff person involved to complete an incident report if one had not been done within that time.

recommended that Alexander relocate. Based upon the incident report for that date, when there were eight residents, including one on EP status, the level of supervision was unacceptable because Alexander was from another facility, which made it even more important to have a second staff member on the floor for the overnight shift. Also, with regard to the report for April 7, when there were thirteen residents, including two on EP status, the level of supervision was unacceptable because only one staff member, rather than two, monitored the second floor. Staff should be at either end of the hallway to ensure vision of the entire hallway. Further, policy required continuous visual supervision of EP residents under SS3 supervision. The impact of having only one staff person on the upstairs unit is that in the event that staff member had to enter a resident's room, the remainder of the area would be unsupervised.

According to White, administrators are held to a higher standard and need to be role models. They are ultimately responsible for the facility. Appellant was trained as a youth worker with regard to policy and would be responsible for knowing policy. As a youth work supervisor, he is even more responsible. If a supervisor or assistant chooses to take responsibility the floor, he or she would have to be on the floor. The facility administrator has ultimate responsibility, and appellant has responsibility, in her stead, to obtain sufficient staff. One does not supervise residents from the offices. It is the responsibility of the assistant superintendent on duty to prevent what occurred here.

On cross-examination, White testified that the policy permits that one youth worker be assigned to whoever is on EP status, even if that is one, two, or even three residents. And the other staff member would monitor the floor. Admittedly, Policy 9.01 (R-16) does not indicate that two staff are required to simultaneously station the floor. Also, February 17 was remarkable because it was usual to have ascend two supervisory levels to get staff coverage. Concededly, two-person staff coverage is not established in a written policy. Further, there was no adverse consequence here. Although EP residents were not observed properly, all fifteen-minute checks were done and the juveniles were safe.

Though unsure about appellant's whereabouts during the February incident, White claimed that there was a violation in April because the reporting indicated that he

remained in the office. Epps was not working at the time. So appellant, as the administrator "on call" or on-site, became responsible for proper supervision of the unit. The "overnight standard" was set by the director of the Office of Community Programs and it was "not negotiable." A directive was issued, though he is unsure when, where, or whether it is even written. White again confirmed that two-person staffing is not written policy.

With regard to appellant's disciplinary history, White testified that a discipline status report (R-32), indicates that appellant received the following: (1) official written reprimand (February 25, 2005); (2) official written reprimand (February 8, 2007); (3) one-day suspension for neglect of duty (February 22, 2010); (4) three-day suspension for incompetency/inefficiency, failure to perform duty, and violation of policy (August 5, 2010); (5) five-day suspension for neglect duty (October 10, 2010); (6) five-day suspension for neglect of duty (April 5, 2011); (7) demotion for neglect of duty (June 30, 2011).

**Robert Montalbano**, the JJC's interim deputy director and director of Community Programs, testified that he is responsible for local and community programs, education, and rehabilitation and treatment services. DOVES is under his jurisdiction.

The Juvenile Supervision Policy (9.01) does not stipulate staffing ratios because of the diversity of programs and facilities. However, staffing patterns and protocols within the Office of Community Programs for the midnight shift require no less than two staff members, and sometimes three or more. All staff are aware of and familiar with that standard by way of scheduling, as well as review of in-house training. Proper function of the overnight shift would include two staff stationed in an appropriate supervision location to see all rooms, a ten-to-fifteen-minute check of each room, and log-ins.

According to Montalbano, referencing the FNDA (J-1), it is not permissible to supervise residents from a different floor. An assistant supervisor, like other staff, needs to be on the same floor as the residents because direct visual supervision is

needed. According to Montalbano, there is a higher standard for managers, and an assistant superintendent is responsible for safety and security issues.

Montalbano referenced an email dated May 20, 2008 (R-30),<sup>12</sup> relative to protection against escapes, that mentions, "On our midnight shift it is required to have at least two scheduled employees. Sometimes when there is a resident or residents that present a security risk, we assign extra coverage to work the shift." According to Montalbano, that information is contained in supervision Policy 9.01. The staff has training on policies and procedures and acknowledges such training, and safety and security issues are reviewed. It is expected that protocol will be followed.

Montalbano reviewed appellant's disciplinary history (R-32), stating that he had been demoted in June 2011 as progressive discipline relative to neglect-of-duty issues. Montalbano had met with appellant to improve his performance.<sup>13</sup> An improvement plan was established and included in his performance assessment review.

On cross-examination, Montalbano testified that after his first two disciplines, appellant was promoted from among the top three candidates on the civil service list, though any of the candidates could have been chosen. Also, both of his five-day suspensions involved violations for incomplete "paperwork."

Montalbano cannot point to any written document establishing a protocol requiring a staffing level of two persons for the overnight shift. It is not in Policy 9.01. Rather, he had seen it in a memo around 1999 or 2000 from then director of Community Programs, Todd Rickter, to superintendents. At the time, appellant was not a superintendent and thus would not have received the memo. Montalbano cannot say that it was shared with appellant or communicated to staff. Montalbano did not personally tell appellant that two staff were required for the overnight shift, and actually does not know if anyone told him. According to Montalbano, appellant had to know it,

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<sup>12</sup> Montalbano testified that he had prepared a letter for his executive director, providing input for the Attorney General's office, regarding a two-person staffing level for supervision of midnight shifts.

<sup>13</sup> Epps was then the superintendent and Guy White was the regional supervisor for DOVES.

because “we’ve been doing it twenty years.” It is a matter of practice or protocol, though not in the policy. Montalbano conceded that nowhere is it written that an assistant superintendent is subject to discipline for there being less than two staff.

Montalbano denied that another policy’s indication that two staff are required for sixteen or more residents pertained to the midnight shift.<sup>14</sup> Rather, revised Policy 9.01 (R-14) applied at the time, and it does not mention a two-to-sixteen ratio. In his view, it was not unusual for staff to reach out for shift coverage, as occurred with Alexander. Based upon his knowledge and experience as a youth worker and administrator, it would be impossible for staff to be unaware of the required two-person coverage that had been the standard for overnight shifts for more than twenty years. Further, superintendents would have disseminated the subject memo to staff, by protocol. Appellant was functioning as assistant superintendent on each of the subject occasions. Montalbano conceded, however, that he did not know how the memo was processed or how “someone coming on (board)” would know that he was subject to discipline.

**Appellant Willie Smith** testified that he has been a JJC employee for approximately fifteen years. After attending the police academy in 2000, he became a youth worker (2001–05), youth worker supervisor (2005–07), and assistant superintendent, at DOVES (2007–). During his service as assistant superintendent, he never received any documentation indicating the requirement of a two-person-minimum staff for overnight shifts. Appellant has seen instances where one staff member has supervised.

At DOVES, the superintendent’s role covers paperwork, and Epps had asked appellant to do scheduling. According to appellant, it was not unusual for a supervisor to complete paperwork downstairs. February 17, 2011, was unique because both overnight employees had “called out,” and employees on the prior shift had worked double-time and, by law, they could not stay. Appellant had come in after working another shift. According to protocol, appellant called the (DOVES) superintendent but

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<sup>14</sup> As discussed below, Policy 15.02 addressed staffing patterns and staff-to-juvenile ratios.



received no answer, so he called the regional superintendent, who had him call regional administrator Josey. Ultimately, there was only one person from the Elias program who was available for staff coverage.

Appellant is sure that Policy 15.03 (effective January 1, 1999) which relates to staffing patterns and staff-to-juvenile ratios, applied at the time. He produced a copy of the policy, in draft format, as last revised on January 15, 2004. (A-1.) In pertinent part, it states that "the facility administrator shall determine the number of coverage staff members necessary" and that "there shall be a minimum of two staff on duty at all times in programs with the juvenile population of 16 or more." (A-1 at 2.) It further indicates that any emergency staffing patterns shall be approved by the regional administrator. That policy had been given to appellant by another supervisor, Vicki Major, a short time before he began working at DOVES, and it was the only one to his knowledge that addresses staffing requirements.

There were ten residents at DOVES on February 17, and thirteen on April 7, 2011. On February 17, both Epps and her supervisor were unavailable. White directed appellant to Josey, who found one staff member. Appellant was simultaneously on duty doing paperwork that Epps had requested. On April 7, the overnight staff was out because Epps had wanted them trained. Appellant came in during his time off and was working on paperwork as assigned; he had previously been suspended twice for "paperwork" violations. No juvenile was injured and there was no incident of any kind on either date.

Appellant subsequently received, by copy from Epps, an email chain generated by Amy Burns (May 26, 2011), Cindy Rich (June 2, 2011), and Diane Epps (June 3, 2011). (A-2.) It states in pertinent part:

Cindy,

Please note the following information that will be placed in our supervision policy for DOVES RCH:

11:00 pm to 7:00 am (overnight shift) will remain on the 2nd floor/dorm area within D. O. V. E. S. RCH at all times in

order to provide direct visual supervision of all residents. One staff must remain within the D-1 dorm area and one staff must remain within the D-2 dorm area. . . .

Diane

>>> Cindy Rich 6/2/2011 9:04 AM>>>

Good Morning, please be reminded that the supervision policy reviews are due to me by tomorrow. Please forward your review . . . .

Thank you,  
Cindy

>>> Amy Burns 5/26/2011 9:20 8 AM>>>

Good morning everyone—

It is being requested that you please review your Section V of the Juvenile Supervision Policy (09CP:09.01) and update that section to ensure that it specifically states where staff should be situated during the overnight shift. (Ex. For DOVES—overnight staff should remain upstairs in the dorm area at all times to provide direct supervision.) Please have these updates completed by Friday, June 3rd and forward to Cindy Rich so they can be reviewed.

Thank you - Amy

[ibid.]

That was the first time that he was ever informed that two staff were required (for an overnight shift), and it was an amendment to the policy relative to unit specifics.

Here, he was presented with extraordinary circumstances and acted in accordance with policy and procedure as he understood it to be, and did all he could short of calling the director. He has held the position of youth work supervisor for the last three years, during the pendency of this appeal. Appellant had worked for three or four years without any problem and had received an excellent exceptional PAR in July

2009. He described his prior disciplinary infractions as essentially frivolous in nature, noting that he was never disciplined for putting a child at risk.

On cross-examination, appellant again testified that policy 15.03 (A-1) was in effect at the time of the subject incidents. Prior to Epps's correspondence dated June 3, 2011, there was no (other) written standard. On or about April 26, 2011, appellant had met with Montalbano regarding unit coverage in the absence of policy requiring two-person staffing. According to appellant, Montalbano stated that there was nothing to refute that there was such a void. Hence, Epps's email communication on June 3 (A-2) was generated to put that staffing requirement into policy.

### Summary

Making factual findings requires a weighing of the credibility of the witnesses, *i.e.*, "an overall assessment of the story of a witness 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 interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.) (citation omitted), certif. denied, 10 N.J. 316 (1952). A trier of fact may reject testimony because it is inherently incredible, or because it is "inconsistent with other testimony or with common experience," or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). 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).

Epps and White first testified that appellant breached a two-person staffing requirement of the juvenile-supervision policy, but later testified that the policy does not actually include such a requirement. Montalbano initially testified that the policy does not stipulate staffing ratios, yet he subsequently testified that the policy contained a two-person requirement for the overnight shift, as had been indicated in an email. Further, Montalbano's testimony is inconsistent with that of Epps and White regarding whether

appellant faced an unusual situation in having to arrange for coverage in February 2011. The testimony of Epps and Montalbano is also vague regarding the establishment of staffing protocol by the director of Community Programs, as neither could specifically indicate how such protocols were established.

Appellant presented a forthright demeanor and his testimony was credible, including that relative to policy regarding staffing requirements and ratios at DOVES in February and April 2011. His testimony in that respect was corroborated by documentary evidence, specifically, Epps's email dated June 3, 2011.

Based upon the testimony and exhibits, as well as the opportunity to observe the appearance and demeanor of the witnesses, I further **FIND AS FACT**:

1. Appellant's responsibilities as assistant superintendent, RGC, include the management of the staff and activities for the care and custody of juvenile residents at DOVES.
2. While it was customary to have two youth workers stationed on the second floor at DOVES for supervision of residents, there was no established written policy in February and April 2011 requiring a minimum two-person staffing level for overnight shifts when there were less than sixteen residents.
3. On February 17, 2011, appellant was confronted with unique circumstances, when both staff members did not report for the overnight shift and appellant's appropriate search for coverage required him to communicate at two higher supervision levels and it yielded only one available staff person. Appellant covered that shift along with youth worker Alexander, who had been reassigned for that coverage. Appellant frequently monitored the juvenile residents and Alexander throughout the night, while he also did paperwork in the office downstairs.
4. On April 7, 2011, appellant worked the overnight shift in order to complete required paperwork and, in the absence of a second youth worker, covered that

shift along with youth worker Calderon. Calderon completed juvenile monitoring forms for S.B. (R-13A) and Y.E. (R-13B) that indicate that both juveniles went to bed at 11:15 p.m. and remained there through the night. Appellant monitored the status of the juvenile residents and Calderon during the night, both by telephone and in person, while he also did paperwork in the office downstairs.

5. On each date, the residents, including those on EP status, were not left unsupervised. Their status was regularly checked and documented, there were no incidents, and there was no harm to their welfare.

6. In practice, the Juvenile Supervision Policy permitted one youth worker to be assigned supervision of more than one EP resident.

7. In February and April 2011 there was no written policy that established that an assistant superintendent at DOVES was subject to discipline for maintaining a staffing level of less than two persons during an overnight shift.

8. At the beginning of June 2011, subsequent to the alleged infractions, Epps and others made arrangements to include in the Juvenile Supervision Policy the requirement of two-person staff coverage for DOVES's overnight shift.

### **LEGAL ANALYSIS AND CONCLUSIONS**

Under the Civil Service Act, a public employee may be subject to major discipline for various employment-related offenses, N.J.S.A. 11A:2-6, including neglect of duty, N.J.A.C. 4A:2-2.3(a)(7), and other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12). On appeal from the imposition of such discipline, the appointing authority has the burden of proving justification for the action, N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a), and the employee's guilt by a preponderance of the competent, credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). Preponderance may be described as the greater weight of the credible evidence. State v. Lewis, 67 N.J. 47 (1975).

Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job.

The general causes for discipline set forth in N.J.A.C. 4A:2-2.3(a) include the present alleged offense of other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12). In this case, the specific charges include violations of JJC's Juvenile Supervision Policy 9.01, in that appellant "remained on the first floor while leaving one staff member alone to supervise the residents."

Here, there was no established written policy regarding a minimum staffing requirement for the overnight shift at DOVES in February and April 2011. Clearly, Epps's own email dated June 3, 2011, indicates that two-person coverage "*will* be placed in our supervision policy for DOVES RCH." (A-2, emphasis added.) While on duty on February 7, and April 17, 2011, appellant covered the overnight shift along with one youth worker who was stationed on the second floor and continually supervised the juvenile residents. Appellant regularly monitored their status, which was adequately documented, and there were no incidents and no harm to their welfare. Contradictions and inconsistencies in respondent's proofs lay bare its inability to establish, by a preponderance of credible evidence, a failure by appellant to perform a required duty or conform with an established policy or procedure regarding juvenile supervision.

I therefore **CONCLUDE** that respondent has not met its burden of proof, by a preponderance of the credible evidence, to sustain the charges of neglect of duty, and other sufficient cause, namely, the above violations of JJC's Juvenile Supervision Policy 9.01.

#### **DECISION AND ORDER**

Respondent has not proven by a preponderance of the credible evidence the charges of neglect of duty, and other sufficient cause, namely, the above violations of

JJC's Juvenile Supervision Policy. Therefore, it is hereby **ORDERED** that the decision of the Juvenile Justice Commission, demoting appellant from his position as assistant superintendent, RGC, is **REVERSED**.


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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, 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.

November 2, 2015

DATE

  
\_\_\_\_\_  
**ROBERT BINGHAM II, ALJ**

Date Received at Agency:

11/2/15

Date Mailed to Parties:

11/2/15

/lam

**APPENDIX**

**WITNESSES**

**For Appellant:**

Willie Smith

**For Respondent:**

Kenyon Alexander  
Robert Calderon, Sr.  
Diane Epps  
Herbert White  
Robert Montalbano

**EXHIBITS**

**Joint:**

J-1 Final Notice of Disciplinary Action (2 pgs.)

**For Appellant:**

A-1 Confidential Intra-Agency Advisory, Consultative and Deliberative Materials, dated January 1, 1999 (2 pgs.)  
A-2 Supervision Policy, dated June 3, 2011 (1 pg.)

**For Respondent:**

R-1 Preliminary Notice of Disciplinary Action, dated June 29, 2011 (1 pg.)  
R-2 Lobby log entries for Kenyon Alexander, dated February 17, 2011; February 18, 2011; and February 19, 2011, log pages 390–91 (1 pg.)  
R-3 Communication log entries for Kenyon Alexander, dated February 17, 2011, and February 18, 2011, log pages 450–57 (2 pgs.)



- R-4 Kenyon Alexander's Incident Report, dated March 17, 2011—incorrect version (2 pgs.)
- R-5 Kenyon Alexander's Incident Report, dated February 17, 2011—corrected version: R-5A: Corrected Incident Report; R-5B: Ed Niemiera/Antar Simmons email (3 pgs.)
- R-6 DOVES floor plan—Kenyon Alexander (2 pgs.)
- R-7 Kenyon Alexander's Monitoring Form for T.C.—incorrect version, dated February 17, 2011 (first and second page) (2 pgs.)
- R-8 Kenyon Alexander's Monitoring Form for T.C.—corrected version, dated February 17, 2011 (first page) and February 18, 2011 (second page): R-8A: T.C. corrected version; R-8B: E-mail from Antar Simmons to Robin Josey, dated May 9, 2013 (3 pgs.)
- R-9 Lobby log entries for Robert Calderon, dated April 7, 2011, and April 8, 2011, log pages 470 and 471 (1 pg.)
- R-10 Communication log entries for Robert Calderon, dated April 17, 2011, and April 8, 2011, log pages 270 to 273 (2 pgs.)
- R-11 Robert Calderon's Incident Report, dated April 7, 2011 (2 pgs.)
- R-12 DOVES floor plans for Robert Calderon (2 pgs.)
- R-13 Robert Calderon's Juvenile Monitoring Forms for S.B. and Y.E., both dated April 7, and April 8, 2011: R-13A: S.B.'s Juvenile Monitoring Form; R-13B: Y.E.'s Juvenile Monitoring Form (4 pgs.)
- R-14 Policy Number 09CP:09.01 "Juvenile Supervision," dated November 2, 2009 (4 pgs.)
- R-15 Community Residential Staff Training Cycle #001 (2 pgs.)
- R-16 Policy Number 09.01 "Juvenile Supervision," dated November 18, 2003, original date of January 1, 1999 (5 pgs.)
- R-17 Notice of Personnel Actions: R17-A: Appointment to Youth Worker at Preakness Academy; R-17B: Permanent Reassignment to Essex RGC, effective April 21, 2001; R-17C: Provisional Promotion to Senior Youth Worker, effective October 20, 2001; R-17D: Permanent promotion to Senior Youth Worker, effective April 30, 2002; R-17E: Promotion to Youth Worker Supervisor, effective April 2, 2005, Green; R-17F: Promotion to Assistant Superintendent, effective December 12, 2007, DOVES (6 pgs.)

- R-18 Job Specifications for Assistant Superintendent, Residential Group Center (Job Spec. No. 61954) (4 pgs.)
- R-26 Notes of Diane Epps dated April 8, 2011 (4 pgs.)
- R-30 Email from Director Montalbano, dated May 20, 2008 (2 pgs.)
- R-32 Discipline Status Report for Willie Smith (2 pgs.)
- R-33 Final Depositions: R-33A: Official Reprimand Memo, dated February 25, 2003;  
R-33B: Final notice of Minor Disciplinary Action (CWA), dated April 23, 2007 (7 pgs.)