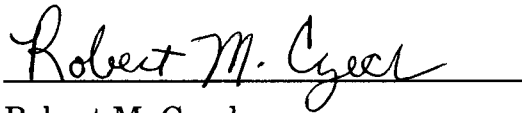


Re: Thomas McNulty

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
AUGUST 19, 2015

A handwritten signature in cursive script that reads "Robert M. Czech". The signature is written in black ink and is positioned above a solid horizontal line.

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 03608-15

AGENCY DKT. NO. N/A

**IN THE MATTER OF THOMAS
MCNULTY, CAMDEN COUNTY
CORRECTIONAL FACILITY,**

Charles E. Schlager, Jr., Esq., for appellant (Law Office of Charles E. Schlager, Jr.)

Antonieta P. Rinaldi, Assistant County Counsel, for respondent,
pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: June 28, 2015

Decided: July 15, 2015

BEFORE **SARAH G. CROWLEY**, ALJ:

STATEMENT OF THE CASE

Appellant Thomas McNulty, a Corrections Officer at Camden County Correctional Facility (CCFC), appeals his removal for conduct unbecoming a public employee, insubordination, inability to perform duties, neglect of duty, discrimination that affect equal employment, and Other Sufficient Cause; C.C.C.F. Rules of Conduct: 1.1 Violations in General; 1.2 Conduct Unbecoming; 1.3 Neglect of Duty; 1.4

Insubordination; 2.10 Inattentiveness to Duty; 3.2 Security; 4.1 Curtsey; 4.6 Dissemination of Information; 4.7 Official Correspondence; General Order #73, #74, #203; et al.

PROCEDURAL HISTORY

On January 22, 2015, the respondent issued a Preliminary Notice of Disciplinary Action, seeking appellant's immediate suspension. Following a hearing, respondent issued a Final Notice of Disciplinary Action on February 6, 2015, sustaining the charges and seeking appellant's removal. The appellant requested a hearing and the matter was filed at the Office of Administrative Law (OAL), on March 9, 2015, to be heard as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on June 11, 2015. The parties submitted post-hearing submissions on June 28, 2015, and the record closed on that date.

SUMMARY

Appellant is a Correction Officer at the Camden County Correctional Facility (CCCF). The allegations involve highly inflammatory and racist text messaging between a number of corrections officers, including the appellant, which were directed at colleagues, superiors, residents and blacks in general. In addition to the offensive nature of the messages themselves, the messages demonstrate that cell phones were being taken into the CCCF, photographs were being taken of officers and inmates in the jail and photographs were taken of confidential information on the correction center computer. There were no black officers or individuals involved in any of the text messaging. As a result of a shakedown in the facility, the cell phone of another officer was confiscated. The prosecutors retrieved over 5,000 text messages from this phone which were part of the group chats between the officers in question. The appellant does not dispute that he received any of the messages in question. The appellant has argued that he only responded to 142 of the messages. The appellant also claims that although he had a personal cell phone in the secure portion of the facility, he sometimes

used his persona phone for work related matters. He concedes he never received authorization to bring his person phone into the facility.

TESTIMONY

For respondent:

Captain Christopher Foschini had been a Corrections Officer for the CCCF for twenty-one years, before his promotion in October of 2014. He had been assigned to internal affairs for eighteen years. He completed the investigation of this matter and prepared a report which he submitted to the Warden following his investigation. He testified that on December 30, 2014, his unit was conducting an investigation into cell phones in the facility, which is strictly prohibited. The investigation followed a shakedown that they conducted in November. They questioned Officer King during their investigation and he advised them that Officer Jacob, another Officer was in possession of a phone and was using it in the facility. When they questioned Officer Jacob, it was obvious that he was hiding something, but he denied that he was in possession of a cell phone. He said that his cell phone was in his car and he did not bring the cell phone into the facility. Captain Foschini observed him take something out of his vest and hide it on the shelf in the room where they were questioning him. They caught him when he went to retrieve it as he was leaving the room. Officer Jacob had two cellphones because he had a girlfriend who communicated with him on a separate phone than the one he used for his wife and family. The phones were confiscated and turned over to the Camden County Prosecutor's Office.

Captain Foschini identified a notebook which was entered into evidence which contained a print out of all the text messages between Officer King and the other officers in the CCCF. There were over 5,000 messages between the officers from September 30, 2014, to December 28, 2015. The messages contain photographs and videos taken in the jail and thousands of messages between the officers. The photographs demonstrate that several of the officers, including Officer McNulty

smuggled phones into the facility. Cell phones and Photographs are prohibited in the facility. In addition, photographs were taken of inmates and the computer screens in the facility which contains highly confidential information. Captain Foschini testified that there were 5782 text messages retrieved between the periods of September 30, 2014, to December 28, 2014. There were approximately five to ten officers from the facility included on the group text messages. On December 8, 2014, Officer Finely asked to join in the chats.

All of the 5,782 text messages were entered into evidence without objection.¹ Captain Foschini read several of the messages which he deemed to be inappropriate, racist and in violation of the policy prohibiting discrimination in the workplace and constituted conduct unbecoming an employee. Captain Foschini indicated that the messages routinely referred to the Warden as the "HNIC" which stands for "head nigga in charge."

Some of the text messages which came from Officer McNulty were as follows:

- November 21, 2014 - "Haha. I think Pizzaro forgot the old man is the HNIC."
- November 26, 2014 - "WTF, need help here. Since when the fuck is Annie black??? Just saw an ad with little davis running around singing."
- November 28, 2014 - "Maybe he was looking for camo for his Mud duck."
- November 29, 201 - "Niggas be quite as hell"
- December 8, 2014 - "Niggas be quiet"
- December 8, 2014 - "New one nigga's"
- December 8, 2014 - "Had to share again" Picture of baby monkey with white eyelids and mouth.

¹ Counsel for appellant raises for the first time in his post-hearing submission an issue regarding the consent of Officer King to have his cell phone searched. There was no objection to the admissibility of the text messages at the hearing, and thus, any such objection was waived by appellant. Moreover, the appellant himself introduced and moved 142 messages that he wrote into evidence.

- December 13, 2014 - "Nigga's be quiet. Everyone got the idesse not like the coon's? Was a rough nite of cheap food, and good booze. How much did 351 pay for Hennesey?"
- December 19, 2014 - "Last week was my full for the year. Cant handle anymore of hoodboogers doing the electric slide to every song."
- December 25, 2014 - "Merry Christmas to all my Knee-Grows. Have a blessed one"

For appellant:

Officer Thomas McNulty admitted that he had a cell phone in the secure perimeter of the facility and that he was a party to the chats that had been identified by Captain Foschini and entered into evidence. He testified that he and his colleagues sent messages to each other to vent about things going on at the jail. He acknowledged the use of derogatory language, photographs and jokes aimed at "niggas." He testified that he did not think the comments were racist, and that a "nigga is someone who is arrogant." He eventually conceded that some of his messages were derogatory and that there were no African Americans included on any of the chats. He admitted to having a personal cell phone in the jail for which he never received permission to take into the facility. He maintained that he had a jail issued cell phone that did not have good internet reception which he needed for work, and thus, he would use his personal phone. However, he never got permission to bring his cell phone into the jail, and he was aware that cell phones were prohibited. He was also aware that other officers had cell phones in the facility and were taking inappropriate photographs in the facility, but he never reported these violations. Officer McNulty conceded on cross examination that many of the comments were derogatory, but refused to admit that they were racist.

FINDINGS OF FACT

In view of the contradictory testimony presented by appellant and the respondent witnesses, the resolution of the charges against Officer McNulty requires that I make a credibility determination with regard to the critical facts. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experiences and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718,749 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth. In re Perrone, 5 N.J. 514. 521-22 (1950). See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses, it is my view that Captain Foschini was truthful and credible. His testimony was consistent with the evidence and the statements that were taken during his investigation. With respect to Officer McNulty, he did not dispute the essential facts in this case. He conceded that he had a personal cell phone in the facility and never obtained permission to have it. He conceded that he was aware that other officers had cell phones in the facility and he never reported this conduct. He was also aware that inappropriate photographs were being taken in the facility and transmitted by text message to other officers, including him, and he never reported this conduct. He also

conceded that he was a party to the over 5000 text messages which were moved into evidence in this case.

With respect to the nature of the text messages, I **FIND** Officer McNulty's testimony was not credible that he was unaware that the comments and the dialogue the text messages were derogatory, offensive, racist and a violation of the policy prohibiting discrimination.

Accordingly, I **FIND**:

1. Between October 2014 and December 2014, Officer McNulty received and sent multiple derogatory, inappropriate and racist text messages.
2. Between October 2014 and December 2014, Officer McNulty possessed a personal cell phone in the secure part of the correctional facility, which he did not have permission to have.
3. Officer McNulty received various text messages which contained photographs or videos taken in the correctional facility and of confidential information.
4. Officer McNulty was aware that this conduct was occurring and he was aware that it was a violation of the policies and procedures of the facility. Officer McNulty never reported this conduct to anyone.
5. Officer McNulty sent and received inappropriate text messages which contained disparaging and racist comments about his supervisors and other colleagues.
6. The messages were inappropriate, derogatory, and racist and violated the policy prohibiting discrimination, harassment or hostile environments the workplace; constituted conduct unbecoming and other sufficient cause.

LEGAL DISCUSSION AND CONCLUSION

The Civil Service employees' rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12.6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit

appointment and broad tenure protection. See Essex Council Number 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1971); Mastrobattista v. Essex County Park Commission, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this State is to provide public officials with appropriate appointment, supervisory and other personnel authority in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

Conduct unbecoming a public employee is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Unbecoming conduct has also been defined as any conduct which adversely affects the morale or efficiency of the department or which has a tendency to destroy public respect for employees and confidence in the operations of government services. Hartmann v. Police Department of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992). The Merit System Board and its predecessor and now successor, the Civil Service Commission, and the courts have generally held that law enforcement officers are held to a higher standard than the conduct unbecoming employees because discipline is invoked. Correction officers are law enforcement officers to which this higher standard applies.

The standard of behavior for police and correction officers is set higher than that of other civil service employees, meaning that infractions will lead to major discipline of officers than otherwise may not have warranted severer discipline for some other position. See Moorestown Township v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965). When applied to correction officers, a charge of conduct unbecoming can be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960); Bowden v. Bayside State Prison, 268 N.J. Super. 301 (App. Div. 1993).

This matter involves a major disciplinary action brought by the respondent appointing authority against appellant. An appeal to the Civil Service Commission requires the OAL to conduct a de novo hearing to determine the employee's guilt or innocence, as well as the appropriate penalty if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). The appointing authority has the burden of proof and must establish by a fair preponderance of the credible evidence that the employee was guilty of the charges. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk License Revocation, 90 N.J. 550 (1980). Evidence is found to preponderate if it establishes that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962).

Applying the law to the facts in this case, I **CONCLUDE** that the respondent has proven all the charges by a preponderance of the credible evidence. I **CONCLUDE** that appellant engaged in conduct which constituted a violation of the policy prohibiting discrimination, harassment or hostile environment in the workplace and conduct unbecoming an employee. I also **CONCLUDE** that the respondent has proven that appellant had a cell phone in the correction center, which is prohibited. I also **CONCLUDE** that Officer McNulty knew that colleagues were violating the cell phone and no photography rules in the correction center and failed to report such conduct in violation of the rules of the facility. I also **CONCLUDE** that appellant was aware that

photographs were taken of confidential computer screens and sent by text messages, a violation of the dissemination and confidentiality rules. Finally, I **CONCLUDE** that this same conduct also constituted a violation of rules regarding Neglect of Duty, Insubordination, Inattentiveness to Duty, Courtesy, Dissemination of Information, Personal and Professional Code of Conduct, Official Correspondence, and General Orders #73,#74 and #203.

PENALTY

Once a determination is made that an employee has violated a statute, regulation or rule concerning his employment, the concept of progressive discipline must be considered. With respect to the discipline, under the precedent established by Town of West New York v. Bock, supra, courts have stated, “[a]lthough we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, Id. at 523, “that past record may be considered when determining the appropriate penalty for the current offense.” In re Phillips, 117 N.J. 567, 581 (1990). Ultimately, however, “it is the appraisal of the seriousness of the offense which lies at the heart of the matter.” Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

In the instant matter, the appointing authority considered not only the egregious nature of the charges, but the number of offenses which occurred over a period of time. It is well settled that when charges are egregious enough, a past history of discipline is not relevant and will not militate against an appropriate discipline. Due to the nature of the offenses and the seriousness of the charges, I **CONCLUDE** that removal is not only warranted, but is essential in this case

ORDER

I **ORDER** that the action of the appointing authority removing Officer McNulty is sustained and the appeal is dismissed.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this 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.

7/15/15
DATE


SARAH G. CROWLEY, ALJ

Date Received at Agency:

July 15, 2015

Date Mailed to Parties:

July 15, 2015

SGC/mel

APPENDIX

WITNESSES

For appellant:

Officer Thomas McNulty

For respondent:

Captain Christopher Foschini

EXHIBITS

For appellant:

P-1 Summary of text messages written by appellant

For respondent:

- R-1 Preliminary Notice of Disciplinary Action dated 1/23/15
- R-2 Internal Affairs Report of Captain Foschini
- R-3 Shakedown photo
- R-4 Video and General Photos from cell phone of Officer Jacob
- R-5 Phone Text Chat List
- R-6 Internal Affairs Interview of Officer McNulty dated 1/21/15
- R-7 CCDOC Internal Affairs Order #001
- R-8 CCDOC Rules of Conduct
- R-9 CCDOC Post Order #032
- R-10 CCDOC General Order #042
- R-11 CCDOC General Order # 073
- R-12 CCDOC General Order # 074
- R-13 CCDOC General Order #203
- R-14 Office McNulty Chronology of Discipline
- R-15 Officer McNulty Chronology of Counseling Forms