

A-8



STATE OF NEW JERSEY

In the Matter of Zsuzsanna Rogoeshewski :
New Jersey State Prison, :
Department of Corrections :
: :
CSC DKT. NO. 2016-1784 :
OAL DKT. NO. CSV 110-16 :
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**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

ISSUED: NOVEMBER 28, 2016 BW

The appeal of Zsuzsanna Rogoeshewski, Correction Lieutenant, New Jersey State Prison, Department of Corrections, 30 working day suspension, on charges, was heard by Administrative Law Judge Jeff S. Masin, who rendered his initial decision on September 23, 2016 reversing the 30 working day suspension. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

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 November 23, 2016, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the penalty has been reversed, the appellant is entitled to 30 days of back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10. Further, since the appellant has prevailed, she is entitled to counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning counsel fees are finally resolved.

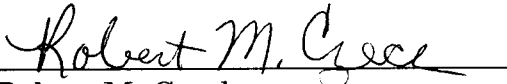
ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Zsuzsanna Rogoshewski. The Commission further orders that appellant be granted 30 days back pay, benefits, and seniority. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for 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.

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
NOVEMBER 23, 2016



Robert M. Czech

Chairperson

Civil Service Commission

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and
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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 110-16

AGENCY DKT. NO. #2016-1784

**IN THE MATTER OF ZSUZSANNA
ROGOSHEWSKI, NEW JERSEY DEPARTMENT
OF CORRECTIONS.**

Kevin D. Jarvis, Esq., for appellant Zsuzsanna Rogoshewski (O'Brien, Belland & Bushinsky, LLC, attorneys)

Karen Campbell, Legal Specialist, for respondent New Jersey Department of Corrections, pursuant to N.J.A.C. 1:1-5.4(a)2

Record Closed: September 16, 2016

Decided: September 23, 2016

BEFORE **JEFF S. MASIN**, ALJ t/a:

Lieutenant Zsuzsanna Rogoshewski (now Rogoshewski-Miller) appeals a suspension for thirty days imposed by her employer, New Jersey State Prison, Department of Corrections ("DOC"). The DOC rendered a Preliminary Notice of Disciplinary Action against Rogoshewski on August 26, 2015, and issued a Final Notice of Disciplinary Action on November 4, 2015. In this latter document, the DOC found the lieutenant guilty of violating N.J.A.C. 4A:2-2.3(a) 12, other sufficient cause, determining that she had violated Human Resources Bulletin (HRB) 84-17 (as amended), sections

B-8, "Serious mistake due to carelessness which may result in danger and/or injury to persons or property;" D-7, Violation of administrative procedures and/or regulations involving safety and security; and E-1, Violation of a rule, regulation, policy, procedure, order or administrative decision. All of the charges stem from an incident that occurred on July 21, 2015, involving events occurring subsequent to the feast held for Muslim inmates of New Jersey State Prison that day in celebration of the Eid al-Fitr, held after the conclusion of Ramadan.¹

Lieutenant Rogoshewski appealed her suspension to the Civil Service Commission, which transferred the case to the Office of Administrative Law on December 22, 2015. The case was originally assigned to another administrative law judge, but upon that judge's departure from the OAL, it was reassigned to this judge, serving on recall, so that the scheduled hearing dates could be maintained. Hearings were held on August 2 and 4, 2016. Counsel filed closing briefs and the record closed on September 16, 2016.

The Preliminary Notice identifies the specific facts that the DOC relied upon in claiming that Lieutenant Rogoshewski violated the several elements of HRB 84-17. As described therein and supplemented by testimony, the contention is that as Muslim inmates were returning from the prison gymnasium where the Eid al-Fitr Feast ("Feast") had been held, they brought with them items of food which were contained in clamshell containers, which, for some reason, were often identified in this record as trays.² Lieutenant Rogoshewski was on duty that day, assigned to and supervising an area where some inmates had to pass in order to return to their housing unit. Rogoshewski allegedly issued an order to the custodial officers serving at that location under her supervision that inmates would only be permitted to take the contents of one clamshell to their cells, regardless of how many they had in hand as they exited from the gymnasium. She permitted them to consolidate whatever food they could into that one clamshell each and ordered that the rest of the food ("described in the Specification as 'large portions'") be discarded in wastebaskets at that checkpoint. When the particular

¹ This feast celebrates the conclusion of Ramadan.

² There were no trays in use; whether the clamshell containers were Styrofoam or some other material is unclear, but the shape is well-described and understood by all.

inmates affected by this order arrived at the housing area, they allegedly surrounded the officer seated in that unit, upset at having to discard the food. In order to “make amends” the prison prepared an identical meal as that offered for the Feast and delivered that meal to sixty-five inmates, who were described as those who “were made to discard their Ramadan Eid al-Fitr Feast meal.” The Specification states that Rogoshewski’s “actions countermanded the directive in place for the Muslim inmates’ celebration and disrupted the orderly operation of the facility.”

Documentary evidence entered in the record includes the menu for the Feast and a memorandum issued on July 6, 2015, by NJSP Administrator Steven Johnson. The memo’s subject was described as “Post Ramadan Package 2015.” This memorandum, which witnesses identified as being identical to such memos issued in prior years, established that the shift commander would be notified at the conclusion of Ramadan by Imam [Rasoul] Suluki, a member of the prison’s clerical staff. The exact date upon which the month of Ramadan concludes is dependent upon the sighting of the new moon. In 2015, that date was either July 16 or 17. Thereafter, the “Post Ramadan Celebration” would be held on July 21, 2015, between 11:30 a.m. and 2:30 p.m. in the gymnasium. In the middle of the second page of the memo is the following language:

“NOTE: Eligible participants will be permitted to bring back portions of their meals to their housing units.”

Lieutenant Rogoshewski does not deny that she did require that the inmates passing through the checkpoint take only one clamshell to their housing unit, allowing them to consolidate food from such other clamshells as they were carrying and requiring that whatever food could not be so consolidated be discarded. She contends that she did so in accordance with the standard practice of the prison, that she did not do so to disparage or discriminate against the Muslim prisoners, that the same limitation is imposed upon inmates of any faith in regard to any other religious celebrations and that her action did not either violate the wording of the memorandum or result in any inmate having to return to their housing units with no food.³

³ The DOC has placed in evidence an Internal Management Procedure, R-35, which addresses various aspects of the religious activities and ritual elements of Islam as they may apply in the prison setting. This contains a specific mandate of the DOC that “no person shall disparage or in any manner demean

Imam Rasoul Saluki, a contract chaplain at New Jersey State Prison who has served with the DOC on a part- or later a full-time basis for many years, noted that the nature of the prison environment made food a very important element of prison life and the post-Ramadan feast is therefore "the biggest thing for inmates." The institution has about 400 Muslim inmates who fast during Ramadan. Although the July 6, 2015, memorandum was sent out in the name of the Administrator, the Imam actually prepared the memo, as he has since he wrote the first such memo in 2007. The memo is issued to "all affected staff." The memo "is the same every year" except for the dates, as Ramadan, being a month in a lunar-based calendar, will fall at different dates on the general calendar. As the Imam understands the procedure, once the draft of the memo has been approved, it is sent out to the various tiers.

Imam Suluki was present at the Eid al-Fitr Feast on July 21, 2015, with about 250 Muslim inmates participating. The day after the event he was told that inmate workers were told to throw out portions of their food. He was not told that the inmates were allowed to consolidate food into one clamshell. Nor was he told that anyone was ordered to dispose of all of their food. He advised the Administrator and eventually was interviewed by Major Borg. He told Borg that he had been told by inmates that Lieutenant Rogoshewski had ordered that the food be discarded. The Imam reported that he had been made aware of threats made by inmates, who were very upset about having to discard food, although no inmate who told him of the situation would have mentioned any threats to do anything. The Imam explained that it was very fortunate that despite this, nothing had happened, there had been no disturbance.

Imam Suluki explained that inmates serving as food service workers receive a "perk" in that they receive more food. He was not aware of the mix of worker and non-worker inmates amongst those ordered to dispose of food after the post-Ramadan Feast.

an inmate's religious belief." While several witnesses for the DOC referred to the lieutenant's action as disparaging the inmates in the practice of their religion, it is important to note that the Specification does not include this allegation, and the charges themselves do not identify any violation of the specific IMP as a basis for discipline. Such a serious allegation may be implied in the charges; but it is not specifically referenced.

On cross-examination, the Imam agreed that the post-Ramadan celebration memo does not specify anything about the number of "trays" or clamshells that an inmate may take back to his housing unit, as it speaks of "participants" permitted to bring "portions of their meals" to their housing units. He acknowledged that there had been no discussion of what "portions" meant, as that question had never been brought up.⁴

Imam Suluki was not involved in the decision to supply a second Feast, although he was "impressed" by the decision.

Donald Kilpatrick, a senior corrections officer with the DOC, was on duty on July 21, and was assigned to the unit where the Muslim inmates who had been required to dispose of food were housed. When they returned to the housing unit, they were agitated due to having to dispose of the food and fifteen to twenty inmates crowded around Kilpatrick's desk, refusing to lock into their cells. Kilpatrick contacted Sergeant Sobern, who, while not Kilpatrick's supervisor that day, was the manpower sergeant at 1E where the inmates had been told to dump their food. Sobern told Kilpatrick that he had nothing to do with the disposal of the food. When Kilpatrick spoke to Major Borg in August, he told the Major that Sobern had told him that Lieutenants Rogoshewski and Patrick S. Miller were responsible for the order.

Officer Kilpatrick did not call anyone else about the incident. He did not file a special report about it. Sergeant Sobern did not tell him to file a report. Kilpatrick did tell the agitated inmates that he would get them a "remedy form," which is a written document that they can file about their grievances. Kilpatrick was not disciplined for any of his conduct in regard to the events of that day. Nor were any of the inmates who refused to lock in or who were surrounding him at his desk disciplined. No threats were

⁴ The memo was not changed after the events in question in this case, although the memo for the Eid al-Adha, which came two months later, was changed based on this situation. That memo stated that "eligible participants will be permitted to bring back portions of their meal to their housing units. In addition, all close custody units will have their food brought to the unit." The second sentence does not appear in the July 6 memo, but the language still does not address anything regarding the definition of what "portions of their meal" means in terms of quantity or the number of allowable containers.

voiced during the incident. No inmate in that group identified Rogoshewski as the officer who had ordered the food to be dumped.

Kilpatrick said that at the time of the incident in the housing unit he was "not afraid," but he was "nervous" and "concerned," although, as he stated, "It's prison" and therefore he was "always concerned." He had not seen this sort of conduct before.

George Hanuschick, supervisor of the food service operation at the State Prison, testified that the cost of the second Eid Feast was \$418.89, and it was prepared for sixty-seven inmates, that number supplied to him by the Imam. The order to provide the feast came at a meeting at which Imam Suluki was not present. This was the first time that such a second feast was prepared.

Stephen G. Alaimo is the Security Major for New Jersey State Prison. He is the commander with oversight over the day-to-day operations of the prison, and is responsible to assure the security of staff and inmates. On July 22, he was approached by a representative for the sergeants and a representative for the line officers, concerning an issue occurring the previous evening in which Muslim inmates were required to dispose of "excessive" food. He was told that Muslim inmates were "up in arms" and there was concern about a possible incident. Alaimo discussed the matter with Administrator Johnson. Alaimo was advised that an inmate named Rose, who serves as clerk to the clergy and is, according to Alaimo, the "most influential Muslim," wanted to see him. Alaimo went to 3A and talked to Rose, who told him what had happened, that inmates were made to throw food away after the Eid feast. Rose said there was talk "about doing nasty things," but Rose claimed that he got the agitated inmates to let him speak with "authority" before they did anything. After hearing of the situation, Alaimo had Lieutenant Rogoshewski pulled outside the security area. Administrator Johnson felt that it was best to have a second Feast prepared and Imam Suluki was tasked to provide Mr. Hanuschick with a list of those to receive this second feast. Alaimo characterized this second meal as a "good faith gesture" from the Administration.

Major Alaimo offered that in his experience inmates always brought back a "plethora" of food from the Eid feast, for which food is prepared "in excess." Workers at the Feast would bring back even more food. However, as he had served most of the time during his years at the prison on the first or third shift and not on the second shift during which the feast was held, he had no personal knowledge of what happened in these other years in regard to the excess food.

Major Alaimo acknowledged that although he was on duty on July 21, he heard nothing that day about inmates being angry. He did not hear of threats. No discipline was issued to any inmates, although he noted that an investigation as to any threats would have been carried out by the institution's Special Investigations Division (SID). As for Kilpatrick, had the situation that officer said he had been confronted with occurred to Alaimo, he would have issued a special report and would have advised his superior. Kilpatrick was not disciplined for failing to do either of these.

The Major explained that an officer is to follow an order issued to the officer even if it appears to countermand an existing IMP. No officer alerted Alaimo that they felt that Lieutenant Rogoshewski was countermanding any such IMP. The witness agreed that while still acting within the limits of the existing rules and regulations, different lieutenants run their compounds differently, and that within those limits, they have some discretion as to how to operate. Thus, some lieutenants may be stricter or more lenient than others and still operate within allowable limits.

Thomas Phillips, a lieutenant since February 2013, testified that on July 21, 2015, he was assigned to supervise the South Compound and he allowed whatever food the inmates brought back with them from the gymnasium to be taken to their housing area. He had seen the post-Ramadan memo. The amount of food the inmates had did not matter to him. After the incident that day, he heard "hearsay" reports about threats. He did not speak with Lieutenant Rogoshewski prior to his shift on the July 21.

Lieutenant Phillips agreed that no definition of "portions" was ever provided. He agreed that so long as they act within the limits of the regulations and procedures,

lieutenants “absolutely” have discretion in running their units. He also agreed that within the prison, inmates use food as currency.

David A. Borg, the Administrative Major at New Jersey State Prison, oversees the IMPs, investigations and the day-to-day operations of the facility. In summarizing what he learned in the investigation of the incident, he noted that “past practice” had been to allow the Muslim inmates returning from the post-Ramadan Eid al-Fitr Feast to take as much food as they could carry back to their cells. This differed from the limitations placed on the inmates generally, such as when they returned from normal meals eaten in the mess hall. In the incident under review, departing from past practice by requiring Muslim inmates to dispose of some of the food they carried from the gym posed a security concern, creating an issue that provided these inmates with a sense of unity. There could have been a violent response to the episode. Lieutenant Rogoshewski’s decision to require that inmates dispose of food was a “serious mistake.” If she had the thought to impose this limitation, she should have consulted with Administration to seek approval for her choice. This would have allowed for consultation with the Imam and with the tier supervisors as to the past practice. Changes in past practice can result in incidents and injuries and Lieutenant Rogoshewski was not authorized to change the practice without authorization from Administration. Her action countermanded orders that other supervisors were following. Given the past practice, there was no reason to spell out to supervisors what was permitted.

Major Borg explained that after concluding the investigation, he determined that Rogoshewski had violated regulations by countermanding past practice and the orders that other supervisors on the South compound were implementing, doing so without authorization. Her action discriminated against Muslim inmates. If she believed that other supervisors were not following the rules, she should have reported this to the proper authority. He acknowledged that he did not know if supervisors on the other unit had actually issued any orders, but if Rogoshewski intended to implement something other than the past practice she should have consulted with Lieutenant Phillips.

Major Borg noted that the throwing away of food and containers did not address any safety or security concern. According to Borg, the remaining clamshells and food carried by the returning inmates were not searched.

The July 2015 post-Ramadan Feast was Major Borg's first such event at NJSP. Both Lieutenants Rogoshewski and Miller told him that the requirement to dispose of "excess" food and containers had been in place on prior occasions and applied to other religions as well. However, in determining that "past practice" was to the contrary, Borg explained that he took the "majority view." The Imam, Major Alaimo, Lieutenant Phillips and other officers said that there was no limit on the amount of food and containers that could be brought to the housing unit after the post-Ramadan Feast. Borg agreed that perhaps fifty supervisors had worked the Feast in the past, but he did not ask all of them for their view of the practice. At the time of the investigation, Lieutenants Miller and Rogoshewski were not yet married.

No one approached Major Borg on July 21 to tell him about a large group of inmates being agitated. He only learned of this "in the following days." He agreed that such an "unusual incident" should have been reported to a supervisor. Although Officer Kilpatrick said that he notified a sergeant, no written report was prepared. No discipline was sought against any other officers or, to his knowledge, against any inmates as a result of the event, this despite his awareness of reports of a "substantial security risk" to Rogoshewski in the institution. However, Borg saw Rogoshewski's conduct as "more severe." He did acknowledge that lieutenants had discretion in operating their areas of supervision.

Zsuzsanna Rogoshewski-Miller has been a lieutenant for two and one-half years and was previously a sergeant for four years. She served at NJSP for ten years prior to the incident of July 21. She had worked the post-Ramadan Feast for eight years as an officer; for two years as a sergeant; and then as a lieutenant. On July 21, 2015, she worked the second shift and the movement of inmates from the gym toward their housing units which occurred at about 2:30 p.m. She was assigned as the North Compound lieutenant, overseeing the movement with a sergeant and other officers. She was at the podium outside of 1E. Lieutenant Miller, Sergeant Sobern, Officers Pazik,

Romano and Englehard were present throughout the entire movement. She had not seen the post-Ramadan memo (or packet) that day, but saw it days later. It was the same as it had been for ten years. She received no notice of any change to the memo or the orders. She gave the same order that day as she had given at every such feast movement, that food in excess of that which would fit in one container was to be discarded. There was never any doubt that food could be brought back from the Feast, only that there was this limit of one container. No written directive had been issued about the number of such containers to be allowed to be taken to the housing units. Rogoshewski did not believe that the limitation she imposed was in conflict with the memo. The limit had been imposed for each such feast she had participated in. When she issued her order to each GA officer in the area, no one objected. No one said that she was countermanding any order or rule of any other supervisors. She did not speak to either Lieutenant Phillips or Sergeant Horn about the issue and was not aware that they had issued any orders about it. No inmate complained to her when told to dispose of the food or containers; none complained in her presence. Officer Pazik actually told the inmates to dump the containers and food; he did not tell her of anyone complaining. As for the number of inmates involved in the movement, she did not believe that there were more than twenty. There was no delay in the movement, a fact confirmed by Major Borg. Inmates were permitted to consolidate as much food as they could into one container. No inmate was stopped from taking some food to the cells. Contrary to what Major Borg stated, Rogoshewski explained that, as was the normal practice, a random search for contraband was conducted, with inmates patted down and some told to open their containers, but no food was ever touched.

Lieutenant Rogoshewski explained that inmates used food they had in their housing areas as currency, they used it to brew "hooch," or to pay for favors or to offer favors to other inmates. This is the reason for limiting the amount of food permitted in the housing units. The limitation has nothing to do with religion. She made no comments about the inmates' religion, and heard none from other officers. She imposed the same limitation on members of other faiths in respect to their feasts. She also explained that during Ramadan itself, when the observing inmates cannot eat from sunrise to sunset, no limitation is imposed on the amount of food brought back to the housing units, as they will bring their breakfast, lunch and dinner meals, "so technically

they are allowed three trays, some of them have more, some of them less . . . during that month there is no limitation, again, this is not a written rule, this is not a written regulation, there is no memo pertaining to this, this is just what the practice has been. So during that month they are allowed to carry anything, anything they can carry they can take.” However, as she understood the memo, the Feast is, as it states, a post-Ramadan event, here six or seven days after the fast days have ended. Lieutenant Rogoshewski emphasized that to her knowledge, what she did was in accord with past practice and there was no reason for her to change from what she had known before.

During the remainder of her shift on July 21, Rogoshewski heard of no threats to her, or any complaints about what she had done. She heard about complaints a few days later when she was banned from the secure area. She was not permitted to see or learn any details of the threats allegedly made towards her. As for how inmates knew she had given the order to discard food, she did not speak about it at the checkpoint, so they could only assume it was her.

Patrick S. Miller, a lieutenant since October 2013, and subsequent to the events in question married to Lieutenant Rogoshewski, worked the post-Ramadan Feast at New Jersey State Prison in 2009, 2010, 2014 and 2015. On July 21, 2015, Lieutenant Miller was assigned to work the second shift and was stationed at the end of the ramp to 1E, standing next to Officer Pazik. Lieutenant Rogoshewski was in command at that post. At the time Miller and Rogoshewski were in a relationship and lived together. He denied that his testimony concerning the events in question was affected by any bias in his wife's favor, and he offered that he would not lie under oath for her.

On July 21, Rogoshewski voiced a “general statement” that the one container rule would be enforced. This was not a surprise to Miller, as this was the way things had “always been done” when he was working the Feast. Lieutenant Van Pelt had been his area supervisor and had done the same thing. As of July 21, Miller had not seen the post-Ramadan package for 2015, but when he saw it later on, it was the same as that which had been issued in previous years. Rogoshewski's order did not concern Miller, as he did not understand it to be countermanding the memo as he knew it from prior occasions. No instruction had been provided to him about what to do that day, or on

other such occasions. No one complained about Rogoshewski's order. No one suggested that it countermanded any prior order, memo or past practice. No inmate objected to the officers at the time they were told to consolidate the food into one container and dispose of any remaining unconsolidated food and additional containers. There were no delays in the movement of the prisoners. Perhaps ten to fifteen inmates had to dispose of some food; all inmates were able to take some food to their cells. There were "absolutely" nowhere near sixty-five inmates who disposed of food. It was not possible to determine whether the inmates who disposed of food were workers.

When Miller learned of the investigation into what had occurred on July 21, he was surprised because it had been routine practice. Miller denied that anyone made any comments or joked or laughed during the processing of inmates through the post.

Victor L. Horne, now a lieutenant, who has served for over fourteen years at the New Jersey State Prison at various levels, testified that when he worked the post-Ramadan Feast on July 21, he was working under the supervision of Lieutenant Phillips. He did not receive any orders from Phillips about food, and was not aware of any orders that Lieutenant Rogoshewski had issued at her post. Horne explained that so long as they acted within the limits of the existing regulations and orders, the lieutenants had discretion as to how to run their post.

Stanley Pazik was an officer assigned on July 21 to work with Lieutenant Rogoshewski. Pazik has worked eight such feasts, with several different supervisors, including Sergeants Zubba and DeVito. He did not see the July 2015 post-Ramadan package. Pazik did not recall any orders that Rogoshewski might have issued that day, but he explained that on other occasions other supervisors had limited the inmates returning from the Feast to one tray. This had been past practice since at least 2007. No one was required to throw all of their food away, no inmate complained, no threats were uttered. Random frisks and cursory searches of open containers were conducted, as was the normal practice. No officer suggested that the limitation to one container was a violation of practice or of any order. Pazik was never interviewed by anyone concerning the episode, which surprised him, as he was the longest serving general assignment officer.

Discussion

In appeals before the Civil Service Commission from disciplinary actions taken by appointing authorities, the burden of proof regarding alleged violations of governing rules, regulations and the like rests upon the appointing authority, which must prove the charges by a preponderance of the credible evidence. In re Polk, 90 N.J. 550, 560-62 (1982); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

The present case involves a charge that Lieutenant Rogoshewski violated a “rule, regulation, policy, procedure, order or administrative decision” and that in doing so she caused a situation that involved safety and security concerns. The Specification of the alleged violation set out in the Preliminary Notice of Disciplinary Action claims that Rogoshewski violated a specific “directive” that was “in place for the Muslim Inmates celebration” During this hearing, the appointing authority has identified that specific directive, that is, the specific “rule, regulation, policy, procedure, order” that she violated as the memorandum issued by Administrator Johnson on July 6, 2015, which had as its subject the “Post Ramadan Package 2015.” This memo contained a number of points regarding how the institution would operate in accommodating the Muslim inmates’ requirements for the proper observance of the important events occurring following the end of the month-long Ramadan period, which is recognized as of supreme importance in the practice of observant Muslims’ religious practice. The single element of this memo that lies at the heart of the controversy is found in the middle of the second page of the memo. It follows text which addresses the “Post-Ramadan Celebration,” which details what has been referred to as the “Feast” that follows the close of Ramadan, although that meal apparently is held not at the very end of the month of Ramadan, but some days thereafter. The following is the exact text at issue, and while the parties, both during the hearing and in briefs, have at times referred to this text, they have not always quoted it exactly. As it is the “rule” that Lieutenant Rogoshewski allegedly violated, it is necessary that the exact words be considered, not some paraphrased version. It reads,

“NOTE: Eligible participants will be permitted to bring back portions of their meals to their housing units.”

Thus, some inmates, designated here as those “eligible participants,” will be permitted to bring “portions of their meals” to their housing units. The statement is written in the plural, that is, it speaks of not one participant allowed to bring back a portion of his meal, but of multiple such individuals, “participants”, bringing “portions of their meals.” The undisputed evidence in this case is that despite the hue and cry over whether Lieutenant Rogoshewski improperly limited the amount of food that each returning individual inmate was permitted to bring to his housing unit, every single inmate was allowed to return to the housing unit with food. There is no allegation, much less any evidence, that any inmate was totally deprived of food, was completely disallowed to return to the housing unit without one clamshell containing as much food as they were able to place in that shell.

The memo speaks of “portions” of “meals.” The word “portion” can have several meanings. Merriam-Webster defines it as

- : a part of a larger amount, area, etc.
- : a part of something that is shared with other people
- : the amount of food that is served to a person at one time

Thus, a “portion of a meal” can properly be understood as either the entire amount of food provided to one being served, or taken by one’s self, at a meal, or, just as properly, as a part of that larger amount of food. In the text under review, the “portion” that the inmate is bringing back to his housing unit is described as a “portion of their meal.” It is not stated that “eligible participants will be permitted to bring their meal back to their housing unit.” The memo’s reference to “portions of the inmates’ ‘meals’” appears to reflect what is certainly the likely assumption of the institutional authorities responsible for this memo, that is, that inmates who would choose to attend the Feast would eat at least a part (definitionally a “portion”) of the food they received while in the gymnasium where the Feast was held, and then might well choose to bring back another part (again definitionally a “portion”) to the housing unit. This is a far more likely understanding of the expected behavior of those attending than that inmates would attend and decide to eat none of their food in the gymnasium and instead choose to take it all back with them to their cells. As such, I **FIND** that the evidence is that on July 21, 2015, inmates

attended the Feast and those who chose to take food from the gym and passed through the area under Lieutenant Rogoshewski's supervision arrived at their housing unit with food. Each such inmate was thus permitted to "bring back" a "portion" of "their meal to their housing unit." None were denied this ability.

It is true that one could properly understand the term "portion" to refer to the entire amount of food allocated to an inmate at a meal. This meaning is sometimes used to refer to the amount of food that carries a certain nutritional load, and it may well be the meaning that is most applicable to those charged with running a food service, that is, as a means to determining that amount of particular food items needed to properly feed a certain number of persons. But in the context in which the term is used in the post-Ramadan package, the meaning that makes the most sense is that it refers to a part of that which was served in the gym. Indeed, the Specification itself confirms this understanding of "portion" as referring to a part of the meal, as the appointing authority notes that inmates were ordered to "throw away large portions of their food in the garbage." Thus, they were ordered to dispose of not all of the food, but instead, in other words, of "large parts." Given this as the most appropriate understanding of the term "portions" within the entire sentence in the memo, then it must be accepted that Lieutenant Rogoshewski did not violate the wording of the memo. Given that meaning, I **FIND** that she adhered to its command that "eligible persons be permitted to bring portions [parts] of their meals to their housing units." As the determination of whether the officer violated the written memo that is identified as that which she purportedly offended is to be made by comparing her conduct against the written demand of the "rule, regulation, policy, procedure, order," I cannot see that Rogoshewski violated any such command, and as such, I **CONCLUDE** that the discipline must be overturned.

This said, it is obvious that the appointing authority believes that Rogoshewski violated the accepted institutional understanding of the words of the memo, referred to in the record as the "past practice," which supposedly was that, in the context of the post-Ramadan feast, "portions of their meals" meant whatever amount of food each inmate managed to carry out of the gym, no matter how many containers or what quantity of food that might entail. It is important here to note that there is no evidence whatsoever that the institutional authorities ever issued any written definition of

“portions” or of “portions of their meals,” nor did it provide any training about how this language was to be understood or applied. Thus, supervisory personnel were given the memo, in one manner or another, and as the evidence shows, the content of the memo, particularly as to this sentence, did not change from year to year. They were left to understand it as they might, to interpret it as they saw fit, and to the extent that it might be subject to some interpretation, to exercise reasonable discretion in applying it, discretion which witnesses for both parties have explained is a well understood and accepted part of the supervisory responsibility of persons such as Rogoshewski and her fellow lieutenants. So, if the written memo was reasonably understood to refer to a part of the meal, then the question that might present itself to supervisors such as Lieutenants Rogoshewski or Phillips, or to sergeants such as those mentioned by Officer Pazik, is how much food, how large a “part” or “portion” of the meal, could inmates bring to their housing units. I **FIND** that no one had ever directed them as to the answer to this question. If the appointing authority intended that for this feast, “portion” meant whatever they could carry, it could certainly have made that clear in the memo, but it did not. In the absence of any such official clarification, the supervisors were left to act within their discretion, just as Rogoshewski testified they were in regard to the period of Ramadan itself, when, due to the all-day nature of the fast, prisoners were permitted by Rogoshewski and the other supervisors, acting not by written directive but by an act of discretion, to bring as much food as they chose to their housing units after they had fasted all day. As for the alleged past practice regarding this post-fast days post-Ramadan event, it is of course to be noted that in the face of a written directive, it is to be assumed that officers will act in accordance with the directive and not within some other manner that accords with how some officers decide they want to act. The wording of the directive is the rule to be followed, not some “practice” that is not in accord with that directive. And if the directive is unclear in its meaning, then so long as supervisors act within a reasonable understanding of its meaning they cannot be faulted for doing so, as they have that discretion unless they have clearly been instructed as to the manner of interpretation to be applied. I **FIND** that no such instruction was ever given. I **FIND** that in this instance, Lieutenant Rogoshewski acted within the letter of the directive. And the evidence of the so-called “past practice,” which really is a term that is properly applied to contract interpretation in the collective

bargaining context⁵ rather than to orders and directives issued to officers, is, at best, equivocal. Some of the officers involved in the investigation and some of those interviewed had very limited or no previous experience with the Feast. Interestingly, one who certainly did, Officer Pazik, who was on duty that very day, was never interviewed by Major Borg during his supposedly "full and fair" investigation, yet Pazik had years of experience with the post-Ramadan feasts and his testimony was unequivocal that the limitation of the amount of food permitted to be taken to the housing unit after that event had been applied many times before. I found his testimony credible, as I found Lieutenant Miller's, despite any implication that may have been suggested that he would not have been truthful due to his obviously close relationship with Lieutenant Rogoshewski. Both testified clearly and their information does not deviate from what the memo's wording states, as Rogoshewski's testimony also does not. Others may well have been more lenient about allowing larger amounts of food and numbers of containers to be taken to the housing units, as, according to Rogoshewski herself, all of the supervisors were during the fast days themselves, but if "past practice" is relevant here, which, given that the wording of the directive governs along with the accepted discretion accorded to supervisors to act so long as they do so reasonably within that wording, I do not concede, then I **FIND** that there is no clear proof that there was a well-accepted and understood general practice that governed this situation. If the "survey" conducted by Major Borg to determine "past practice" resulted in a majority view that no limit was being imposed for the post-Ramadan feast, then the Administration may wish to incorporate that view into future iterations of the memo, but in the face of an unclear memo and given the discretion allowed to lieutenants, this supposed "majority" position does not govern this major disciplinary proceeding.⁶

All of the above, including the conclusion that Lieutenant Rogoshewski did not violate the directive, does not mean that I do not understand and accept that some Muslim inmates who were directed to discard food were upset and that they confronted

⁵ Hence the citation of cases and treatises by the appointing authority dealing with collective bargaining and from the Public Employee Relations Commission.

⁶ Whether one views the memo as unclear or not may depend upon what understanding one places on the word "portions," but as there are two meanings for that term that can reasonably apply in the context of "portion" of a meal, the memo can be seen to be unclear if only one meaning is meant to apply. As explained above, I believe that the meaning of the term here is best understood in the context as meaning a part of the whole meal, and not the whole meal. In that case, Rogoshewski's understanding was correct.

Officer Kilpatrick. While I **FIND** that, perhaps curiously, none protested to the officers at the point where they were directed to discard food, none voiced dissent there, none made threats, no one told the supervisors and officers at that location that they were not acting as other supervisors and officers had at the time of other post-Ramadan Feasts, I **FIND** that by the time they approached Kilpatrick in the housing unit, some inmates were agitated.⁷ The testimony suggests the possibility that some more militant, perhaps younger, inmates were the trigger for this agitation. Perhaps that is so, and perhaps certain “internal” developments within the Muslim inmate community may have caused agitation over something that had not been a source of such disruption before.⁸ By the time the inmates arrived at the housing unit, all inmates had food from the Feast in their possession, but not all of the food they left the gym with. They might argue that there should be no limit for any of the inmates after such a religious feast, not only for workers but for all attending Muslims, and perhaps they were correct. Perhaps the Administration should more clearly explain this to the corrections personnel. But the words of the directive were followed. If this did not accord with the “spirit” in which the directive was meant, then it is for the Administration to make clear in writing exactly what it intends in the future, thereby eliminating the need for any exercise of discretion.

It is also important to note that the security-related rationale for limiting the amount of food that inmates are permitted to take to their housing units was well explained by witnesses for both parties. As such, there can be no surprise that a vigilant officer might apply some typical limit in the absence of a clear directive that in a specific situation such as the Feast, concerns normally applicable to the movement of

⁷ The number of inmates confronting Kilpatrick was no more than fifteen to twenty; the ultimate decision to supply a new meal to sixty or so inmates does not appear to bear any correlation to the number appearing before Kilpatrick or the number passing through Rogoshewski's checkpoint. The Administration clearly acted here to assuage any resentment in the Muslim inmate community; their decision is not at all to be criticized, but the number of meals supplied should not be understood as indicative of either the number who discarded part of the food they brought out of the gym or the number who actually complained.

⁸ It might be suggested that there were no prior incidents of complaint because, contrary to their testimony, Rogoshewski, Miller and Pazik had not previously limited the amount of food after the post-Ramadan Feast, and that their testimony was untruthful. However, if they suddenly changed their practice for the 2015 Feast, no motive for such a change has been produced, and after considering their testimony, I **FIND** that they were truthful. Why Rogoshewski, who clearly explained the accepted leniency applied during Ramadan itself, would have changed her past practice for the feast so as to suddenly impose a limitation that she had not imposed in the past, is unexplained. I do not believe that she did. As to why the inmates complained to Kilpatrick when they had not complained before and did not at the checkpoint itself, the answer as to what may have occurred between the inmates is not to be found in this record.

food to cells are to be entirely waived. A directive that informs officers that inmates are allowed to bring a portion of their meal to their cell does not state that they can bring as much as they want, and such "largesse" was not the norm. If it was meant to convey that amount of liberality, the post-Ramadan memo failed to do so.

CONCLUSION AND ORDER

Based upon the evidence, I **CONCLUDE** that Lieutenant Rogoshewski did not violate the post-Ramadan memo. As such, I **HEREBY ORDER** that her suspension must be overturned, and she must be made whole for any lost salary and benefits, as well as reasonable attorney's fees.

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.

September 23, 2016

DATE



JEFF S. MASIN, ALJ t/a

Date Received at Agency:

9/23/16

Date Mailed to Parties:

9/23/16

mph

LIST OF WITNESSES:

For appellant:

Zsuzsanna Rogoshewski
Lieutenant Patrick S. Miller
Lieutenant Victor L. Horne
Officer Stanley Pazik
Lieutenant Thomas Phillips

For respondent:

Senior Corrections Officer Donald Kilpatrick
Imam Rasoul Saluki
George Hanuschick
Major Steven G. Alaimo
David A. Borg

LIST OF EXHIBITS:

Court Exhibits:

C-1 Handwritten chart

For appellant:

A-1 New Jersey State Prison Memorandum re: Celebration of Sacrifice (Eid ul-Adha)
A-2 Supervisor Chaplain Services Interview, Rasoul Suluki, dated July 27, 2015
A-3 For identification only

For respondent:

- R-1 Preliminary and Final Notices of Disciplinary Action
- R-2 Investigative Report by Major Davin Borg, dated August 11, 2015
- R-3 Post Ramadan Package 2015, by Administrator Steven Johnson, dated July 6, 2015
- R-4 Feast of Eid Menu and Replacement Cost for Discarded Meal
- R-5 Internal Management Procedure Level III - #127
- R-6 Internal Management Procedure Level III - #314
- R-7 Weingarten Administrative Rights Form signed by Lieutenant Zsuzsanna Rogoshewski, dated July 28, 2015
- R-8 Lieutenant Zsuzsanna Rogoshewski Interview, dated July 28, 2015
- R-9 Lieutenant Victor Horne Interview, dated July 28, 2015
- R-10 For identification only
- R-11 Submitted as Exhibit A-2
- R-12 For identification only
- R-13 Lieutenant Phillips Interview, dated July 28, 2015
- R-14 Lieutenant Patrick Miller Weingarten Administrative Rights and Interview, dated July 28, 2015
- R-15 For identification only
- R-16 For identification only
- R-17 through R-28 For identification only
- R-29 Law Enforcement Personnel Rules and Regulations
- R-30 NJ Prison Inmate Handbook
- R-31 For identification only
- R-32 For identification only
- R-33 For identification only
- R-34 For identification only
- R-35 Internal Management Procedural Level I – PCS.002.rel.004.ISLAM
- R-36 Lieutenant Rogoshewski Work History
- R-37 Three CD's labeled SC 1D, SC 1DD 7-21-15, 2:40 p.m.—3:00 p.m. and SC 1D Hallway 7-21-15