STATE OF NEW JERSEY

In the Matter of Dashica L. Jordan
Hudson County
Department of Corrections

CSC DKT. NO. 2014-2675
OAL DKT. NO. CSV 06247-14

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: March 4, 2015 PM

The appeal of Dashica Jordan, a Juvenile Detention Officer with Hudson County, Department of Corrections, of her 45 working day suspension, on charges, was heard by Administrative Law Judge Gail M. Cookson, who rendered her initial decision on February 4, 2015, modifying the 45 working day suspension to a 15 working day suspension. 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 March 4, 2015, 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 modified, the appellant is entitled to back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10, following the 15 working day suspension. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, the charges were

sustained. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

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. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved.

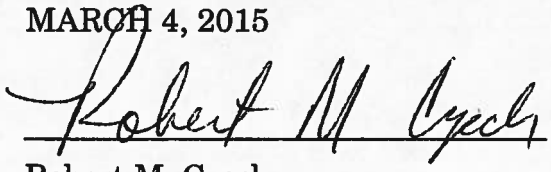
ORDER

The Civil Service Commission finds that the appointing authority's action in suspending Dashica Jordan, was justified. Therefore, the Commission modifies the 45 working day suspension to a 15 working day suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority for the period following her 15 working day suspension. 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.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

The parties must inform the Commission, in writing, if there is any dispute as to back pay 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 should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 4, 2015



Robert M. Czech
Chairperson
Civil Service Commission

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attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 06247-14
AGENCY REF. NO. 2014-2675

IN THE MATTER OF DASHICA L. JORDAN, HUDSON COUNTY DEPARTMENT OF CORRECTIONS.

Samuel B. Wenocur, Esq., for appellant Dashica L. Jordan (Oxfeld Cohen, attorneys)

Daniel W. Sexton, Assistant County Counsel, for respondent Hudson County (Donato Battista, County Counsel, attorneys)

Record Closed: January 29, 2015 Decided: February 4, 2015

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Dashica L. Jordan (appellant) appeals from the decision of the Hudson County Department of Corrections (County) to suspend her from her position as a Juvenile Detention Officer for forty-five days on charges of insubordination in violation of N.J.A.C. 4A:2-2.3(a)(2); conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7); and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11). These charges arise as a result of appellant failing to undertake the 6:15 a.m. scan and visual check of the juvenile

residents in Unit Four of the County Juvenile Detention Center on March 8, 2014. Appellant does not deny that she missed that specific scan but defends the allegations on the basis that there were mitigating circumstances and that the penalty imposed was too severe both in view of her disciplinary record and the discipline given to others in similar circumstances.

On April 8, 2014, a Preliminary Notice of Disciplinary Action was filed seeking to suspend appellant from her position for more than five days, to fine her, or to remove her from her job. The departmental hearing was conducted on April 16, 2014. Thereafter, a Final Notice of Disciplinary Action was issued on April 25, 2014, sustaining the disciplinary charges and suspending appellant for forty-five days. The forty-five day suspension has been served. Appellant appealed that disciplinary action on or about May 1, 2014. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on May 23, 2014, for hearing 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 matter was assigned to the undersigned on July 7, 2014, after a settlement conference was held unsuccessfully with another Administrative Law Judge. I convened a telephonic case management conference on August 19, 2014, and at that time hearing dates and discovery were discussed. The case was originally scheduled to be heard on October 20, 2014, but was then adjourned twice pursuant to counsel request. The plenary hearings were held on January 29, 2015, on which date the record closed with oral closing arguments. The undersigned determined that no post-hearing briefs would be needed, to which counsel consented.

FACTUAL DISCUSSION

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

Robert Mendez was the only witness called to testify at this hearing by the respondent. Mendez has been the Acting Director of Custody for the Hudson County

Department of Corrections Juvenile Detention Center (Center) for approximately two months. Just prior to serving in this new position, Mendez was the Deputy Chief and has worked a total of fourteen years for the County. Mendez described the residential structure at the Center as related to the alleged incident at issue herein. He explained that the number of residents is at a lower than average count resulting in the consolidation of units for overnight lockdown. The facility has a total of six units, each containing twelve bedrooms which can be double-occupancy. During periods of low counts, a unit will more likely have between eight and twelve total residents.

Mendez also testified concerning the role of each officer during the lockdown period, which runs from 10:00 p.m. to 5:45 a.m. on weekdays, and from 10:00 p.m. to 7:45 a.m. on weekends. As stated, during periods of lower occupancy levels, units are consolidated. Every fifteen minutes throughout the night, the officer on duty in that unit is required to conduct a physical check of each room with a flashlight through the windowed doors, and to scan the electronic tag at each doorway. This inspection of the floor is referred to as the Morse Watchman Tour. The scan device is provided to each unit housing overnight residents at approximately 9:45 p.m. each evening. Those electronic scans are recorded in a central office. The on-duty officer must also make written entries for each room in the unit log book.

On Friday, March 7, 2014, Unit Four was combined with Unit Three for the overnight lockdown. The Bed Sheet or actual head count for that evening indicates that there were twelve rooms occupied by sixteen residents. Six were on "close watch," meaning that there were issues of special concern with those youths, including, but not limited to, depression, suicide, escape, or sexual protection. Mendez stated that appellant was the Special Assignment officer overnight, meaning that she worked the floor and also relieved other unit officers for breaks and meals. Mendez explained that the policy behind the scan procedures was to ensure the safety of the facility as well as the safety of the juvenile residents.

As Mendez acknowledged on cross-examination, appellant had worked her regular second shift from 4:00 p.m. to 12:00 a.m. on March 7, 2014, when she was then required to serve a second mandatory overtime shift from 12:00 a.m. to 8:00 a.m.

Mendez also stated that appellant had no prior history of missed scans. His only role in the investigation of this particular incident was to download the scanner history for the times in question, review the videos, and review the logs. He did not interview appellant. Appellant did complete her shift that day and was not put on immediate suspension.

In response to my own questioning, Mendez admitted that there had been "a lot" of missed scans over the preceding three to four years (2011-2014) but that the second half of 2014 showed marked improvement. He defined "a lot" as two to three missed scans per week. Mendez eventually admitted that there was one officer in particular – Officer Finley -- who was responsible for approximately eighty (80%) per cent of the missed scans over that period. Apparently, the County issued multiple progressive suspensions against that officer until eventually she was removed from her position. With respect to the smaller number of missed scans for which there were other officers responsible on a much more minor scale, the County utilized the progressive discipline scheme starting with a written reprimand and then progressing up the disciplinary ladder depending on the officer's prior disciplinary history. Mendez also admitted that appellant followed proper protocol on March 8, 2014, conducting the next scan once she realized that she had missed the 6:15 a.m. scan, and reporting the missed scan as soon as she was relieved on the Unit by the regular on-duty officer.

Appellant called Hassan Malone as a witness on her behalf. Malone is an Administrative Organizer with the AFSCME local, District 1199J. He has worked for the union since 2011, previously holding a counselor position for another correctional agency. Malone has been involved in disciplinary actions for approximately two dozen incidents involving missed room scans. Those disciplinary actions involved five to ten different officers but one -- Officer Finley -- was responsible for five to ten separate departmental actions. He recalled that month after month she would be brought up for missing at least two to three scans per month, which initially resulted in disciplinary suspensions starting at ten days or less. Malone recalled that it took five to six separate disciplinary actions before Finley was terminated. By way of example of other missed scan incidents, Malone was shown minor disciplinary action involving an Officer Small Bey which resulted in only two and three day fines notwithstanding that he was also charged with falsifying the log book. These two missed scan disciplinary actions took

place in successive months but other specifics were missing from the documentation submitted into this record, including his prior disciplinary history.

Appellant also testified on her own behalf. She has been employed with the County as a Juvenile Detention Officer since August 2009. Her job duties include transportation of residents within the facility, lockdown scans and physical inspections, and generally the security and safety of the residents. Appellant confirmed that a unit with overnight residents will have up to sixteen residents with one officer on duty, responsible for conducting the every-fifteen-minute scans and observations. She also explained that the Central Control office can remind the officer on unit duty if a scan is missed because the electronic information is relayed immediately; accordingly, it should be noticed if missed and a radio call can be made to that unit officer. Appellant stated that this never occurred, however, on the morning of March 8, 2014.

On the date in question, appellant was serving a mandatory double shift and had been designated the Special Assignment Officer. As such, she was responsible for conducting searches at the entrance, monitoring the halls, and filling in for unit officers who needed bathroom or meal breaks. Appellant relieved Officer Clarke on March 8, 2014, at between 6:00 a.m. and 6:10 a.m. At fourteen hours into her double shift, she admitted that she was exhausted. She did not realize that she had missed the 6:15 a.m. scan until about 6:20 a.m. There had been no Central Control radio reminder either. She logged the missed scans into the log book and conducted the 6:30 a.m. scans at 6:27 a.m. When Officer Clarke returned to the unit, appellant went immediately to the supervisor's office, explained what had happened, and asked what she needed to do. She was told to complete an Operational Report of the incident. At that time, there was no discussion of what the disciplinary consequences would be. Appellant then completed her shift by resuming her job of searching incoming morning employees. Her next regular shift for March 8, 2014, resumed at 4:00 p.m., as usual.

On cross-examination, appellant agreed that she was advised of the mandatory double-shift policy when she was hired. She also acknowledged that she has received several non-disciplinary notices, a written warning, and four minor disciplinary fines of one, two, three, and five days, respectively, between 2010 and 2014, although the five-

day minor action is currently pending arbitration. She also acknowledged that scanning is important because it is part of her job responsibilities.

I **FIND** that on March 8, 2014, as appellant has admitted, she missed conducting the 6:15 a.m. scan while relieving Officer Clarke during a meal break. I also **FIND** that appellant did not receive a reminder call from Central Control as should have occurred as the backup system. I also **FIND** that appellant conducted a scan at 6:27 and that she truthfully entered the missed scans in the log. I **DO NOT FIND** that there were any safety breaches as a direct result of the singular missed scan although it is acknowledged that the scans and visual inspections of the rooms on the unit are an important component of the overall safety and security of the juvenile facility. I **FIND** that appellant was exhausted after serving a mandatory double shift and while such does not excuse her omission of the 6:15 a.m. scan duty, she promptly and properly reported it and followed all other applicable protocols.

ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 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. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). Governmental employers also have delineated rights and obligations. The Act sets forth that it is State policy to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo

hearing are whether the appellant is guilty of the charges brought against her and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, the County bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

For evidence to be credible it must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Credibility, or, more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

As set forth above, there is no factual dispute that appellant missed the scan that should have taken place on March 8, 2014, at 6:15 a.m. Having concluded that a breach of her employment duties occurred, I must determine the proper penalty or discipline to be assessed. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. See Bock, supra, 38 N.J. at 523-24. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of the concept of progressive discipline is the nature, number and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing

authority has a responsibility to encourage the development of employee potential. In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

In this case, I **CONCLUDE** that the County failed to support its imposition of a penalty of a forty-five day suspension as reasonable and fair by the preponderance of the credible evidence under all the appropriate factors. Appellant had no prior major disciplinary actions. She has had three minor disciplinary fines – a one-day, a two-day and a three-day -- between 2010 and 2013, none of which were for missed scans. There is also a five-day fine but both parties acknowledged that it is presently pending arbitration and also is unrelated to missed scans. Furthermore, appellant proved by a preponderance of the credible evidence that forty-five days is excessive and demonstrably out of the normal range of discipline meted out by respondent for a first-time and isolated missed scan. To the contrary, there is ample evidence that respondent has imposed typically only two to ten-day suspensions on all but the most egregious violator of its scan policy, even then taking months and multiple disciplinary actions to achieve a progressive discipline of the forty-five days imposed on appellant for her first infraction.

Accordingly, and based upon the facts established above at the hearing, I **CONCLUDE** that the penalty of forty-five days is excessive as progressive discipline against appellant insofar as her greatest prior was a five-day fine. It is also arbitrary as compared to discipline imposed by it against other officers for missed scans. Clearly, if the county took years and multiple disciplinary actions to address multiple missed scans engaged in by a former Juvenile Detention Officer, forty-five days for this singular missed scan by appellant is disproportionate. Furthermore, unlike some of the other officers disciplined for this violation, appellant never falsified any records and followed all other protocols immediately after she realized she had missed the 6:15 scan. I also

CONCLUDE that the County padded these allegations by counting the missed scan of Unit Four as eight discrete counts, unlike its charges in prior cases. [A-2]

The essential policies and protocols of the County Department of Corrections would be adequately upheld and would sufficiently teach a lesson to appellant and other officers as to the important of the overnight scans if the penalty imposed were reduced to fifteen (15) days.

ORDER

Accordingly, it is **ORDERED** that the appeal of Dashica L. Jordan from the disciplinary action entered in the Final Notice of Disciplinary Action of the Hudson County Department of Corrections is hereby **MODIFIED**. It is further **ORDERED** that major disciplinary action is **AFFIRMED** and that the penalty imposed for this disciplinary action shall be reduced to fifteen (15) days. It is further **ORDERED** that the Hudson County Department of Corrections shall return to appellant the equivalent of thirty (30) days of back pay, and make any and all other personnel record corrections consistent with this modification. No attorney fees shall be allowed.

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, P.O. 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.

February 4, 2015
DATE

Gail M Cookson
GAIL M. COOKSON, ALJ

Date Received at Agency:

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: FEB - 5 2015

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APPENDIX

LIST OF WITNESSES

For Appellant:

Hassan Malone

Dashica Jordan

For Respondent:

Robert Mendez

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

A-1 Notice of Minor Disciplinary Action Against Officer Small Bey, dated April 26, 2012

A-2 Notice of Minor Disciplinary Action Against Officer Small Bey, dated February 5, 2013

For Respondent:

R-1 Preliminary Notice of Disciplinary Action, dated April 8, 2014, Final Notice of Disciplinary Action, dated April 25, 2014

R-2 Morse Watchman Report, March 8, 2014, 5:59 a.m.

R-3 Operational Reports [various]

R-4 Operational Reports, Officer Russell

R-5 Hudson County Department of Corrections, Policies and Procedures [various]

R-6 Bed Sheet for Units Three and Four, March 8, 2014

R-7 Prior Disciplinary History