



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE
ACTION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Steven Hotz

Reconsideration

CSC Docket No. 2016-8

ISSUED: **NOV 30 2016** (EG)

The Department of Corrections, represented by Kathleen Asher, Esq., petitions the Civil Service Commission (Commission) for reconsideration of the attached final administrative decision, rendered on May 6, 2015, in which the Commission modified Steven Hotz's removal to a 30 working day suspension.

By way of background, Hotz appealed his removal on charges of conduct unbecoming a public employee, neglect of duty and other sufficient cause. An initial decision was rendered by the Administrative Law Judge (ALJ) on April 6, 2015 recommending that the removal be modified to a 30 working day suspension. The ALJ set forth in her initial decision that Hotz had been assigned duties that included touring the inmate's housing area every 30 minutes. Hotz's shift began at 6:00 a.m. and no officer on the shift that day conducted the required security check of inmates at 6:30 a.m., 7:00 a.m., 8:00 a.m., 8:30 a.m., 9:00 a.m., 9:30 a.m., 10:00 a.m., 10:30 a.m. and 11:00 a.m. Hotz performed an assigned duty during the period the 10:00 a.m. and 10:30 a.m. checks were to be performed. Shortly after 11:00 a.m., an inmate worker discovered that an inmate had committed suicide. The ALJ found that Hotz credibly testified that he did not perform all the checks in question as he had been directed to perform other tasks by superior officers and was required to deal with tasks related to safety and security. Hotz also testified that he had requested Senior Correction Officer Dominick Puzio to perform the checks and assumed they were done. The ALJ determined that although Hotz could not perform some of the required checks due to other assigned duties, he neglected to confirm that Puzio conducted the checks. However, the ALJ concluded that Hotz was just one part of a system-wide failure that day which warranted only a 30

working day suspension. Upon a *de novo* review of the matter, the Commission adopted the ALJ's recommendation to modify the removal to a 30 working day suspension.

In the instant matter, the appointing authority, represented by Kathleen Asher, Esq., argues that the Commission erred in not reviewing the video admitted into evidence. It contends that the video supports the charge of conduct unbecoming a public employee as it shows that an inmate hung unsupported in a cell for approximately two hours before another inmate came upon the scene. In this regard, the appointing authority argues that had the Commission viewed the video of the inmate hanging in his cell, it would have concluded that removal was the appropriate penalty. Additionally, it maintains that the record was clear that Hotz failed to conduct nine security checks including those that should have been conducted while the inmate hung himself. The appointing authority states that in *In the Matter of James Stephens, Northern State Prison, Department of Corrections* (CSC, decided December 5, 2008) and *In the Matter of Nicholas Giordano, Northern State Prison, Department of Corrections*, (CSC, decided December 5, 2008) the Commission determined that both officers were ultimately responsible to make sure checks were conducted and failed to do so. Both officers were given the penalty of removal after an inmate committed suicide. It contends that Hotz's failure to perform his duty and conduct the security checks is sufficient to warrant removal in this matter.

In reply, Hotz, represented by David J. Heintjes, Esq., argues that the Commission's decision was well reasoned and based largely on the credible testimony presented at the hearing. He contends that the Commission properly determined that the modified penalty was appropriate based on the fact that the failure was that of the system and not Hotz's alone.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

In the instant matter, the appointing authority argues that the Commission erred in not reviewing the video tape evidence showing the inmate hanging in his cell for two hours. It contends that had the Commission reviewed the video, it would have found the appropriate penalty to be removal. The Commission does not agree. The fact that the inmate committed suicide in his cell and was not found for two hours was not a disputed issue. The issue was whether Hotz's actions constituted conduct unbecoming a public employee and neglect of duty. In this

regard, the Commission agreed with the ALJ's finding that although Hotz could not perform some of the required checks due to other assigned duties, he neglected to confirm that Puzio conducted the checks. Additionally, the Commission agreed that Hotz was just one part of a system-wide failure that day which warranted only a 30 working day suspension. The appointing authority does not provide any arguments as to how viewing a video of the inmate hanging in his cell would change the Commission's finding that Hotz was just one part of a system-wide failure.

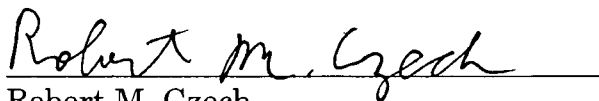
Further, the appointing authority contends that in a prior matter the Commission found that two officers were ultimately responsible to make sure checks were conducted. These officers were removed after the checks were not conducted and an inmate committed suicide. The Commission is not persuaded by this argument. *Stephens, supra* and *Giordano, supra*, are easily distinguishable from the present matter. In *Stephens* and *Giordano*, the officers involved failed to conduct a count of inmates. The officers did not provide any credible testimony as to why they did not conduct the count. In the present matter, Hotz credibly testified that he did not perform all the checks in question as he had been directed to perform other tasks by superior officers and was required to deal with tasks related to safety and security. Based on this fact, the Commission determined that as Hotz was just one part of a system-wide failure, a 30 working day suspension was the proper penalty. Accordingly, under the circumstances presented, the Commission finds no grounds on which to grant reconsideration of its prior decision.

ORDER

Therefore, it is ordered that the petitioner's request be denied.

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
THE 23RD DAY OF NOVEMBER, 2016



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

c: Kathleen Asher, Esq.
David J. Heintjes, Esq.
Steven Hotz
Records center

A-5



STATE OF NEW JERSEY

**DECISION OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Steven Hotz,
Department of Corrections

CSC Docket No. 2014-2640
OAL Docket No. CSV 5534-14

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ISSUED: MAY 21 2015 (EG)

The appeal of Steven Hotz, a Senior Correction Officer with Garden State Youth Correctional Facility, Department of Corrections, of his removal, on charges, was heard by Administrative Law Judge Patricia M. Kerins, (ALJ), who rendered her initial decision on April 6, 2015. Exceptions and cross-exceptions were filed by the appellant and exceptions were filed by the appointing authority.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on May 6, 2015, adopted the ALJ's recommendation to modify the removal to a 30 working day suspension.

DISCUSSION

The appellant was charged with conduct unbecoming a public employee, neglect of duty and other sufficient cause. Specifically, the appointing authority asserted that the appellant failed to conduct required security checks during which period an inmate committed suicide. Additionally, it contended that the appellant failed to secure assigned inmate workers while handcuffed inmates were present and failed to maintain locked unit doors and gates. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

The ALJ set forth in her initial decision that on February 1, 2014, the appellant had been assigned as the North Housing Unit Officer Extra at Garden

State Youth Correctional Facility. His duties included touring the inmate's housing area every 30 minutes. The appellant's shift began at 6:00 a.m. No officer on the shift that day conducted the required security check of inmates at 6:30 a.m., 7:00 a.m., 8:00 a.m., 8:30 a.m., 9:00 a.m., 9:30 a.m., 10:00 a.m., 10:30 a.m. and 11:00 a.m. The appellant conducted the 7:30 a.m. check and was on a break and then performing an assigned duty during the period the 10:00 a.m. and 10:30 a.m. checks were to be performed. Shortly after 11:00 a.m., an inmate worker discovered that an inmate had committed suicide.

The ALJ found that the appointing authority had not presented any evidence from officers or inmates present on the unit during the events in question. Rather, it relied on the two investigating officers. The first investigator, William Maginnis, a Senior Investigator, Parole and Secured Facilities, concentrated on the inmate suicide and did not explore the other disturbances on the unit that day, nor did he review the actions or orders of the appellant's supervisor which could have impacted the appellant's duties that day. The second investigator, Gerard Caldarise, a Correction Major, admitted in his testimony that direct orders from a supervisor and security and safety concerns could trump duties set forth in post orders. With regard to the appellant's failure to maintain locked gates, the appointing authority relied on an out-of-court statement from an inmate and a video review by Maginnis. However, Maginnis admitted on cross-examination that it was not altogether clear from the video that the gate was unlocked. Additionally, the record showed that the possible violation of procedures for not securing inmates properly cited a procedure not in place until one day after the incident in question.

Further, the ALJ found that the appellant credibly testified that he did not perform all the checks in question as he was directed to perform other tasks by superior officers and was required to deal with tasks related to safety and security. The appellant also testified that he had requested Senior Correction Officer Dominick Puzio to perform the checks and assumed they were done. The appellant's testimony was corroborated by the credible testimony of Senior Correction Officer John Petonic.

Based on the foregoing, the ALJ concluded that the charges concerning the unlocked gate and unsecured inmates were not proven by the appointing authority. With regard to the failed security checks, the ALJ determined that although the appellant could not perform some of the required checks due to other assigned duties, he neglected to confirm that Puzio was conducting the checks. It was this failure to observe if Puzio conducted the checks and if not, to bring this to the attention of superior officers, that the ALJ found justified disciplinary action. However, the ALJ found that a penalty of removal was too severe a punishment as during the time in question, the appellant was in contact with and under the supervision of various superior officers, who were able to observe him and direct him to conduct his usual security checks rather than the added duties assigned.

The ALJ determined that the appellant was just one part of a system-wide failure that day which warranted a 30 working day suspension.

In his exceptions, the appellant argues that the ALJ erred in finding he neglected his duty. In this regard, the appellant asserts that he is not a supervisor and he had no duty to supervise Puzio in the performance of his duties. The appellant claims that he is being disciplined for Puzio's neglect of duty.

In its exceptions, the appointing authority argues that the ALJ erred in not removing the appellant from his position. It argues that the evidence shows that he failed to conduct the required security checks on the date in question during which an inmate committed suicide. Additionally, it states that the ALJ accepted the appellant's unsupported testimony that he had delegated his responsibility to conduct security checks to Puzio. It states that the appellant pointed the finger at another officer despite the fact that the post orders for his position required him to complete the security checks. Further, it argues that the evidence clearly showed that the appellant left the gates unlocked and that he failed to properly secure inmates. Finally, it argues that the appellant failed to ensure the safety of those he was entrusted to protect and that his actions were egregious in nature and warranted a penalty of removal.

In his cross-exceptions, the appellant argues that the ALJ relied heavily on her credibility determinations of the witnesses. He contends that her findings were not arbitrary or capricious, and should not be rejected by the Commission. Further, the appellant contends that the appointing authority's exceptions do not set forth any specific findings of fact or conclusions of law in which the ALJ erred. Rather, the appointing authority merely espoused that it is unhappy with the ALJ's decision.

Upon its *de novo* review of the record, the Commission agrees with the ALJ's determination regarding the charges and the recommendation to modify the removal to a 30 working day suspension. In its exceptions, the appointing authority contends that the ALJ accepted the appellant's unsupported testimony that he had delegated his responsibility to conduct security checks to Puzio. In this regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. See *Matter of J.W.D.*, 149 N.J. 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." See *In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission

has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence or was otherwise arbitrary. See *N.J.S.A. 52:14B-10(c)*; *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). Upon review, the ALJ made explicit credibility determinations and found the testimony of the appellant credible. Further, the ALJ found Petonic's testimony credible and indicated that his testimony corroborated the appellant's testimony. Specifically, the ALJ found the testimony regarding the duties the appellant was assigned and the fact the Puzio was asked to cover the security checks was credible. Further, while the appellant claims that he should not be disciplined for Puzio's failure to complete the security checks, the Commission does not agree. The responsibility to complete the checks had been the appellant's. However, due to other orders he asked another officer to cover for him. As the ALJ indicated, the appellant was in a position to observe whether Puzio was performing the security checks and, if not, to bring this to the attention of supervisors. This failure to observe if the checks were being done was what the ALJ determined constituted the appellant's neglect of duty.

In determining the proper penalty, the Commission's review is *de novo*, and the Commission, in addition to its consideration of the seriousness of the underlying incident, utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). Further, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. See *Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the principle of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. See *Carter v. Bordentown*, 191 *N.J.* 474 (2007). The official record reveals that the appellant had been employed since May 2007 and has two minor disciplinary actions in his record, a four-day suspension and a one-day suspension. Clearly, as the ALJ found, based on the sustained infractions and the appellant's disciplinary history, removal is too harsh a penalty given the systematic failure that occurred on the day in question. However, the appellant's failure to observe that his duty to perform security checks was being properly covered warrants a major disciplinary penalty. Accordingly, given the circumstances presented, the Commission finds that a 30 working day suspension is the appropriate penalty in this matter.

Since the removal was reduced to a 30 working day suspension, the appellant is entitled to mitigated back pay, benefits, and seniority pursuant to *N.J.A.C. 4A:2-2.10*. However, since the appellant has not prevailed on the primary issues on appeal he is not entitled to an award of counsel fees. See *N.J.A.C. 4A:2-2.12*. 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, while the penalty was modified, a charge was upheld and major discipline imposed. Consequently, as the appellant has failed to meet the standard set forth in *N.J.A.C.* 4A:2-2.12, 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. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

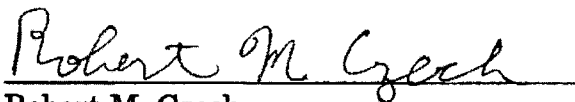
ORDER

The Civil Service Commission finds that the appointing authority's action in imposing a removal was not justified. Therefore, the Commission modifies the removal to a 30 working day suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority for the period after the imposition of the 30 working day suspension through the date of his actual reinstatement. 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. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

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
THE 6TH DAY OF MAY, 2015**



**Robert M. Czech
Chairperson
Civil Service Commission**

**Inquiries
and
Correspondence**

**Henry Maurer
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P.O. Box 312
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 5534-14

AGENCY DKT. NO. N/A

**IN THE MATTER OF STEVEN
HOTZ, GARDEN STATE YOUTH
CORRECTIONAL FACILITY.**

David J. Heintjes, Esq., for appellant

Anthony DiLello, Deputy Attorney General, for respondent (John J. Hoffman,
Acting Attorney General of New Jersey, attorney)

Record Closed: November 17, 2014

Decided: April 6, 2015

BEFORE **PATRICIA M. KERINS, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant Steven Hotz (Hotz) appeals the action of respondent Garden State Youth Correctional Facility (Garden State) removing him from his position of Senior Correction Officer (SCO). By Final Notice of Disciplinary Action (FNDA) Garden State removed him from his position effective April 22, 2014, sustaining the charges of conduct unbecoming and neglect of duty as a result of conduct on February 1, 2014.

On April 28, 2014, Hotz filed an appeal of that action with the Civil Service Commission (Commission). The appeal was transmitted to the Office of Administrative Law (OAL) on April 30, 2014.

The matter was heard on June 12, 2014, with the next scheduled date September 8, 2014. The parties appeared on that date but no testimony was taken so as to allow respondent to resolve subpoena and witness issues. The matter was then heard on September 15 and 16, 2014. Respondent requested that the hearing record remain open for the submission of transcripts and post-hearing briefs. Respondent then requested an extension of time to submit post-hearing briefs due to the assignment of a new attorney to the case. The record closed on November 17, 2014, and the time was extended for the issuance of the Initial Decision.

FACTUAL DISCUSSION

In this matter respondent asserts that Hotz failed to conduct required security checks on the morning of February 1, 2014, during which period an inmate committed suicide. Garden State further charges him with two other violations of security protocols. Those were failing to secure assigned inmate workers while handcuffed inmates were present and failing to maintain locked unit doors and gates unless in use.

Many of the facts in this matter are uncontested. On Saturday, February 1, 2014, Hotz was a SCO assigned as the North Housing Unit Officer Extra at Garden State. Assigned to the first shift on the North 3 Housing Unit (North 3), his duties as a housing officer included touring the inmate's housing area every thirty (30) minutes. (R-8). North 3 consists of four wings with a capacity of one hundred fourteen (114) beds and is denominated a Detention Unit. The other North 3 Housing Officer was SCO John Petonic (Petonic). SCO Puzio (Puzio) was assigned to the unit that morning as the General Assignment Officer (GA).

Many of the material facts in this case are undisputed. On that morning the first shift began at 6:00 a.m. and Petonic and Hotz relieved the third shift officers at that time. SCO Foley (Foley) the officer on the third shift advised them there had been

disturbances among the inmates during his shift and that an inmate on the D wing had thrown urine and feces at an officer. As a result a sergeant would be arriving to oversee the movement of that inmate. At 6:15 a.m. Puzio arrived to assist the assigned housing officers with their daily responsibilities and to assist the General Assignment Sergeant as directed (A-3). The morning food trays arrived sometime after 7:00 and Hotz checked them and began their distribution among the unit's four wings from approximately 7:20 a.m. to 7:40 a.m., effectively counting as the security check for 7:30 a.m. However, no officer on the shift that day conducted the required security check of all inmates at 6:30 a.m., 7:00 a.m., 8:00 a.m., 8:30 a.m., 9:00 a.m., 9:30 a.m., 10:00 a.m., 10:30 a.m. and 11:00 a.m. During this time period Hotz was on break and in a supervisor's office performing a duty assigned that morning from approximately 9:40 a.m. until 10:50 a.m.

Given the above facts, the record shows that Hotz conducted the 7:30 a.m. security check as he was overseeing the distribution of food trays and that he was validly off the unit for the 10:00 a.m. and 10:30 a.m. checks. With regard to Hotz's duties regarding security checks, therefore, questions remain as to the 6:30 a.m., 7:00 a.m., 8:00 a.m., 8:30 a.m., 9:00 a.m., 9:30 a.m. and 11:00 a.m. checks.

From just before 8:00 a.m. through the morning, a number of other officers and supervisors were on the unit to deal with unruly inmates, including an inmate who had urinated outside his cell. Those events and the need to move the inmate from the previous night's disturbance resulted in several supervising officers appearing on the wing that morning. Shortly after 11:00 a.m., however, an inmate worker entered the unit's C wing and discovered that the inmate in C-39 had committed suicide. He immediately notified staff and Petonic and Hotz responded. After cutting his body down from where it was hanging, Hotz began resuscitation attempts. Unfortunately the inmate died.

Respondent's Testimony and Evidence

In support of its case Garden State presented documentary evidence, (R 1-13), including a video from the camera on C wing, the site of the inmate's suicide. It also

presented the testimony of William Maginnis (Maginnis), a Senior Investigator with the Department of Corrections (Corrections) and Major Gerard Caldarise (Caldarise), the security major at Garden State. It did not present testimony from any of the several officers present on the unit that morning.

Maginnis testified as to the contents of his investigative report (R-6) and reviewed the footage of the video (R-12) from C wing as it was being played. Additionally, his report details the events on the video placed in evidence and played at the hearing in this matter. The video reviewed by Maginnis covers the time period 5:59 a.m. until 11:50 a.m. on February 1, 2014. The footage is from the North 3 Housing Unit CL wing camera, situated to monitor the hallway but not the activities within the cells. The video shows Hotz distributing the food trays at approximately 7:30 a.m. The front of Cell 39 can be seen on the video but the camera did not record directly into the cell. Movement can be seen in Cell 39 from 8:17 a.m. until 9:03 a.m. around the food port on the cell front. Shortly after that a movement can be seen as the inmate attaches a bed sheet to the upper bar near the cell entry and the shadow of his hanging body is seen through the bars. The body is then discovered at 11:04 a.m. by an inmate worker who has entered the wing. There is no evidence on the tape of any officer doing the required security checks after the 7:30 a.m. meal distribution. Maginnis further testified that he reviewed the video from the camera trained on the officers' station at the unit but that video was not elaborated upon nor was it produced in evidence.

Maginnis also testified to the evidence on the tape that the gates to the tier were unlocked and an inmate worker was allowed access through the unlocked gate. On cross-examination he agreed that it was difficult to determine that from the tape whether or not the gate was unlocked and that he based his conclusions on a conversation with the inmate on the video.

Caldarise testified that he was assigned to investigate the inmates's suicide. During the week it was usual to have four officers on the unit as inmate movements required more oversight, while on the weekend two were usually assigned. He reviewed the video (R-12) and interviewed some but not all of the Garden State staff on the unit that day. His investigation did not include an interview of Hotz, Petonic or

Puzio. In his testimony he reviewed the contents of his report (R-7). From his experience in Corrections and his position at Garden State he described Hotz's position as the "extra" housing officer as the #2 on the unit, as well as the officer primarily responsible for the security checks. He cited R-8, Garden State's "Internal Management Procedure" (IMP) #173 as setting forth Hotz's duties. From his review of the video he concluded that Hotz had not performed the required security checks and he noted that any security checks should have been recorded on the unit's log for that day (R-4) and they were not so recorded. He further testified that once a security check was completed a call should have been placed to Garden State's Central Control unit where another log of security checks would be maintained. If a security check is missed and a call does not come in, the procedure according to Caldarise is for Central Control to contact the unit.

Caldarise further testified that from his review of the tape from that morning, the security gate for the housing tier was unlocked allowing inmate workers access to the tier. According to Caldarise, the gates are to be locked.

On cross-examination. Caldarise agreed that officers can be assigned other duties beyond their daily tasks and that Lieutenant Magowan and Sergeant Smith had responded to incidents on the unit that day and had assigned Hotz to prepare lists for the movement of inmates during the time period relevant to this matter. He further agreed that such orders could supersede other duties. As to Puzio's duties as GA, he felt he was there not to assume post orders but to perform whatever duties the supervising sergeant assigned him or her. He did however acknowledge that IMP #125 (A-3), which sets out the duties of a GA, includes routine post duties as part of a GA's duties. Caldarise also was questioned regarding the duty of the shift sergeant to do inspections of the units at least twice a day. According to Caldarise, the emergencies on the unit that day took precedence over the sergeant's explicit duty to do such checks.

Further, Caldarise was questioned regarding the assertion by respondent that Hotz failed to supervise inmates by allowing unsupervised inmate workers in the presence of inmates on the unit. He agreed that the order set forth in A-4 requiring all

inmate workers to be escorted by custody staff on the North Three unit tiers was not in effect on February 1, 2014.

Appellant's Evidence and Witnesses

In support of his appeal appellant testified and presented the testimony of Lt. Bruce Hillman, and CSO Petonic. He also placed in evidence Exhibits A-1 through 6. Hillman testified that he was the shift commander at the facility on February 1, 2014. He signed off on the security check log (A-1) for the day which showed that all required checks had been made on the unit that day. The form was completed at Central Control by Communication Operator Tshawn Layne and he assumed she had communicated with the unit in filling out the form. He further testified to the disturbances on the unit the previous night and that morning. As a result of those disturbances he dispatched a K-9 unit to the unit to assist in maintaining order.

Petonic and Hotz then testified regarding what took place on the unit on the morning of February 1, 2014. Petonic presented a detailed timeline as to the events of the morning (A-6). He described that Saturday morning as unusual, with safety and security issues confronting them as soon as they walked in the door. Due to the disturbance the night before, the inmates were in turmoil and a number of inmates would have to be moved on the unit during that morning's shift. During a briefing by the shift commander he was informed that Sergeant Smith (Smith) would be arriving on the unit to oversee inmate movements. In addition to their usual duties therefore, the unit's regularly assigned officers would be required to assist in those movements.

Further, another inmate disturbance occurred around 8:00 a.m. when an inmate urinated on the floor outside of his cell. Smith was notified and in response he and Lieutenant McGowan (McGowan), along with additional officers responded to the unit. Petonic stated that Hotz was ordered by McGowan to draw up a plan on where to move the various inmates. By about 9:13 a.m. Hotz reviewed inmate moves that McGowan had approved with Smith and was directed to prepare the necessary paperwork, including charges against the inmate involved in the disturbance that morning. Hotz left for break and to deal with paperwork with his superiors around 9:40 a.m. and returned

around 10:50 a.m. As to the required security checks, Petonic testified that they requested Puzio to do the checks as both he and Hotz were dealing with inmate disturbances, inmate movements and the required paperwork for the moves and disciplinary charges.

Hotz then testified to the events of that morning. He reviewed his regular duties which included paperwork, maintenance of log books, rosters and boards, security checks, routine inmate moves and appointments and communication with central control. One of his primary responsibilities on the unit was the drafting and maintenance of required paperwork. On that morning he was briefed by the previous shift's officer about the disturbance from the evening before in which an inmate assaulted a CO with his bodily fluids. Smith then arrived on the unit around 6:45 a.m. and the inmate from the previous night's disturbance was moved to a special plexiglass cell. He then discussed the inmate moves with Smith. Those moves involved an analysis of the inmate roster boards and the facebook to determine open cells and gang affiliations. After his discussion with Smith he had to deal with the distribution of food trays, including the fact that not enough trays had been sent.

During this period the inmates in the D wing were rowdy and complaining about the food. One of the D wing inmates then urinated out of his cell onto the hall floor. Smith and McGowan arrived and McGowan directed him to plan and arrange for the moves required as a result of the disturbances. Hotz then had to set up the moves for six inmates. He testified that it was a time consuming process, almost like a puzzle, as available cells had to be coordinated with the inmates' gang affiliations and any other conflicts. At around 9:40 a.m. he left for his break and to follow Smith's order to report to a supervisor's office to report on the morning's urination incident. He stated he earlier had asked Puzio to complete the security checks and that Puzio had replied he would do it.

When he returned at approximately 10:50 a.m., he had to deal with the arrival of the food trays and the fact that they were again short. After their arrival an inmate worker discovered the body of the inmate in C-39 and Hotz and Petonic immediately

responded. Hotz administered CPR to the inmate after he was cut down but he could not be revived by the medical staff who arrived.

Hotz testified he followed the orders given to him that morning by his superior officers and that direct commands from a superior officer supersede routine post-order duties. Additionally, the unusual events of that morning, along with the need to place safety and security first in dealing with disturbances and the resulting inmate transfers required an on-the-spot prioritization of duties. Finally, he assumed that the security check duty was being carried out by Puzio.

FINDINGS

A review of the record in this matter shows that respondent presented no testimony from officers or inmates present on the unit during the events in question. Rather, it relied upon two investigating officers to present the facts. Both investigations were limited in nature. Neither included interviews of Puzio, Hotz or Petonic. Maginnis concentrated on the facts of the inmate suicide and did not explore the other disturbances on the unit that day which could have impacted the nature and extent of the Hotz's duties. Nor did he explore the actions or orders of superior officers that day which could have impacted Hotz's duties and responsibilities. Caldarise was more expansive in his investigation and in his testimony admitted that direct orders from a supervisor and security and safety concerns could trump duties set forth in post orders.

Respondent's evidence regarding Hotz's failure to maintain locked gates on the tier and allowing unsecured inmate workers to be in the presence of other inmates was minimal. Its case that the tier gates were not locked relied upon an out-of-court statement by an inmate and Maginnis' review of a video. Yet on cross-examination Maginnis admitted it was not altogether clear from the video that the gate was unlocked. As to the possible violation that inmates were not secured properly, the record showed that the procedure cited was not in place until after the day in question. (A-4).

In contrast to respondent's case, appellant presented direct testimony from Petonic and himself regarding the events of that day. He does not deny that he did not

perform the security checks that morning, with the exception of the 7:30 a.m. check, and the 10:00 a.m. and 10:30 a.m. checks while he was off the unit on break and at a supervisor's office. He testified extensively however, that he did not perform those checks as he was directed to other tasks by superior officers and required to deal with tasks related to safety and security. As to the required security check of inmates' duty, he testified that he had requested Puzio to do the checks and assumed they were done.

In reviewing Hotz and Petonic's testimony, I find both to be credible. Each man was direct and articulate in presenting the facts of that morning. They were detailed in their recall of that morning and corroborative of each other. Neither denied that Hotz did not conduct the security checks and both were credible that Puzio had been asked to conduct the checks. Their version of the disturbances on the unit and the extra duties those disturbances entailed were specific and detailed with reference to time and related to the events of the morning as they unfolded.

From a review of the record in this matter I **FIND** that Hotz did not conduct security checks at 6:30 a.m., 7:00 a.m., 8:00 a.m., 8:30 a.m., 9:00 a.m., 9:30 a.m., 10:00 a.m., 10:30 a.m. and 11:00 a.m. I **FIND** Hotz was off the tier on his break and at a supervisor's office as directed by a superior during the 10:00 a.m. and 10:30 a.m. checks. Additionally, due to inmate disturbances Hotz was assigned additional duties by his superiors on the morning of February 1, 2014, and that he requested CO Puzio to assume the security checks.

I further **FIND** that respondent failed to show by a preponderance of the evidence that Hotz did not lock the tier gates on February 1, 2014. Finally, I **FIND** that an order requiring inmates be secured in the manner Hotz is charged with violating was not in effect until after February 1, 2014.

DISCIPLINARY HISTORY

Appellant's disciplinary history is set forth in Exhibit R-9. It consists of a four-day suspension in 2007 and a one-day suspension in 2009 as testified to by Hotz.

LEGAL DISCUSSION

Public employee rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12.6. A public employee protected by the provisions of that Act may be subject to major discipline for a wide variety of offenses connected to his or her employment and the general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a).

In an appeal from a disciplinary action or ruling by an appointing authority the burden of proof is on the appointing authority to show that the removal of appellant was justified. N.J.S.A. 11A:2.21; N.J.A.C. 4A:2-1.4(a). That burden is to establish by a preponderance of competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 142 (1962); In re Polk, 98 N.J. 550 (1982).

In this matter, appellant's removal was based on a violation of the following:

N.J.A.C. 4A:2-2.3(a)6: Conduct unbecoming;

N.J.A.C. 4A:2.2-3(a)7: Neglect of duty

N.J.A.C. 4A:2.2-3(a)12; Other sufficient cause

HRB 84-17 as amended

B.2 Neglect of duty, loafing idleness or willful failure to devote attention to tasks which could result in danger to persons and property;

C.11 Conduct unbecoming an employee;

D.7 Violation of administrative procedures, and/or regulations, involving safety and security;

E.1 Violation of a rule, regulation policy, procedure, order or administrative decision.

As set forth above, respondent did not meet its burden as to the two specifications that Hotz failed to lock tier gates and secure inmates properly. It did however, show that Hotz did not conduct security checks at assigned times on the morning of February 1, 2014. The issue however, is whether his failure to do so was

excused or mitigated by security and safety concerns arising of inmate disturbances on the tier.

The evidence shows that Hotz was assigned additional duties that morning by his superior officers. Both Hotz and Petonic were credible that they had requested CO Puzio to assume the security check duties that morning. The record shows that Hotz was not idle or loafing that morning, but rather he was busy performing many of his usual duties as well as responding to directions by his superiors. With the tier at its reduced weekend staffing, the imposition of added duties by his superiors required Hotz to prioritize his workload. Unfortunately, his assumption that Puzio would conduct security checks was tragically misplaced.

While Hotz was not at fault for following his superiors' directions that morning, he neglected to check that the security checks were being performed by Puzio. Although assuring that the required checks took place appears not to have been a concern to a number of superior officers on the tier that morning, Hotz was present in the officer's area on the tier with Puzio and Petonic. While busy at times, he was in a position at times to observe whether Puzio was performing such checks and if he was not, he was in a position to bring that failure to his supervisors' attention.

It was that neglect of duty, his failure to observe whether Puzio conducted the checks and if not, to bring that to his superiors' attention that justifies disciplinary action. Given his minimal disciplinary history, and the mitigating facts surrounding his actions that morning, the sanction of removal goes too far. During the time in question Hotz was in contact with and under the supervision of various superior officers who were able to observe him and direct him to conduct his usual security checks rather than the added duties he had been assigned. Hotz was not the sole cause of security checks not being conducted that morning. Rather, he appears to have been just one part of a system-wide failure that morning. For his part in that failure he warrants a thirty-day suspension for neglect of duty. On the other disciplinary charges against him, respondent did not meet its burden by a preponderance of the evidence.

DECISION AND ORDER

Based on the foregoing, it is therefore **ORDERED** that respondent's action removing appellant from his position as Senior Corrections Officer is **REVERSED**. I further **ORDER** that appellant receive a thirty-day suspension for the charge of neglect of duty. All other disciplinary charges against him are **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. 40A:14-204.

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.

April 6, 2015
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency:

4/6/15

Date Mailed to Parties:

4/6/15

cmo/mph

APPENDIX

WITNESSES

For Appellant:

Lieutenant Bruce Hillman
Officer John Petonic
Steven Hotz

For Respondent:

William Maginnis
Major Gerard Caldarise

EXHIBITS

For Appellant:

- A-1 Security Check Log, dated February 1, 2014
- A-2 Internal Management Procedure # GS 173.00
- A-3 Internal Management Procedure # GS .125
- A-4 Interoffice Communication to All Custody Staff from Major J. Caldarise regarding North Three inmate workers, dated February 5, 2014
- A-5 Preliminary Notice of Disciplinary Action, dated July 18, 2014
- A-6 Report of Officer Petonic, dated February 1, 2014

For Respondent:

- R-1 Final Notice of Disciplinary Action, dated April 22, 2014
- R-2 Preliminary Notice of Disciplinary Action, dated March 11, 2014

- R-3 February 1, 2014 Daily Schedule (DOC8 to DOC9)
- R-4 February 1, 2014 Log Book (DOC10 to DOC11)
- R-5 Special Custody Report by Appellant, dated February 1, 2014 (DOC12)
- R-6 Investigation Report by William Maginnis (DOC13 TO DOC29)
- R-7 Incident Investigation and Report by Major J. Caldarise (DOC30 to DOC39)
- R-8 North Three Detention Internal Management Procedure (DOC40 to DOC45)
- R-9 Appellant's Work History (DOC55)
- R-10 DOC HR Bulletin 84-14 As Amended (DOC61 to DOC116)
- R-11 DOC New-Hire Orientation Checklist Receipt by Appellant (DOC117 to DOC119)
- R-12 CD of North SCL 7A, Camera 13, dated February 1, 2014
- R-13 Hand-drawn Sketch

