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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Steven Hotz,
Department of Corrections

CSC Docket No. 2017-1342
OAL Docket No. CSR 16631-16

ISSUED: OCT 04 2017 (SLD)

The appeal of Steven Hotz, a Senior Correction Officer, Garden State Youth Correctional Facility, Department of Corrections, of his removal, effective October 7, 2016, on charges, was heard by Administrative Law Judge Joseph Lavery (ALJ), who rendered his initial decision on July 11, 2017. Exceptions were filed on behalf of the appellant and a reply to the exceptions was filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on September 20, 2017, accepted and adopted the Findings of Fact and Conclusions as contained in the initial decision and the recommendation to uphold the removal.

DISCUSSION

The appointing authority presented the appellant with a Final Notice of Disciplinary Action (FNDA) which indicated that he was removed on charges of conduct unbecoming a public employee, and other sufficient cause, *i.e.*, physical or mental abuse of an inmate, falsification and/or intentional misstatement of a material fact in connection with work or in any record, report, investigation or other proceeding and violation of a rule, regulation, policy, procedure, order or administrative decision. Specifically, the appointing authority asserted that in November 2015, the appellant and two other Senior Correction Officers physically abused an inmate by holding him down in a barber chair, punching and slapping

him and cutting his hair. The appointing authority also alleged that the appellant provided a supplemental interview in which he admitted to providing false information during his initial interview. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

Prior to the hearing, the appointing authority brought a motion for partial summary decision. It asserted that there were no material facts in dispute with regard to the charge of falsification. Specifically, it maintained that the appellant gave two recorded statements. During the first interview on March 11, 2016, he denied any knowledge of or familiarity with the inmate and/or the incident at issue. However, during the second interview on May 26, 2016, the appellant admitted to knowing the inmate, and he conceded that he took part in the incident although he denied that he physically abused the inmate. In response, the appellant brought a cross-motion for partial summary decision, requesting the dismissal of the falsification charge for violations of constitutional and statutory requirements. Specifically, he argued that the charges against him were ambiguous and lacked specificity. The appellant also argued that the charge of falsification was not filed within the 45-day time limit imposed by *N.J.S.A.* 30:4-3.11a. Further, he asserted that the March 11, 2016 interview was in violation of the fifth, sixth and 14th amendments of the United States Constitution, and the Attorney General's Guidelines. The appellant asserted that, as all inferences must be made in favor of him, factual issues remain including the interpretation of policy, and his reason for his statements.

In deciding the motions, with regard to the appellant's allegation that the falsification charge was not timely filed, the ALJ determined that issue concerned a dispute of fact that was to be resolved at the hearing, but that issue did not bar him from determining whether the substance of the falsification charge could be decided on the motion of summary decision. The ALJ found that a comparison of the video recordings of the appellant's interview make it clear that the appellant lied in the March 11, 2016 interview. Moreover, the appellant's statements in the May 26, 2016 interview confirm that he knew his prior statements were untrue. The ALJ concluded that the change could only be seen as contradictory, and his March 11, 2016 statements were *per se* an intentional misstatement of material facts. The ALJ found that the appellant's state of mind was irrelevant to the charges since his own video-recorded statements precluded any doubt that it was his intention to deceive. The ALJ found the remainder of the appellant's arguments unpersuasive. In this regard, he noted that the charges against the appellant were not ambiguous as the specifications related to the falsification charge indicated that the appellant "admitted to providing false information in the initial interview." He also found that no interpretation of the policy was needed, as the policy concerning personal conduct should be read narrowly. The ALJ found that there were no constitutional deficiencies present in either interview. In this regard, he found that the appellant

submitted to both interviews with full knowledge that they were administrative in nature and not criminal interviews. Moreover, the appellant was provided with due process as evidenced by the appointing authority's adherence to *N.L.R.B. v. Weingarten Inc.*, 420 *U.S.* 251 (1975). In this regard, a union representative was present during the March 11, 2016 interview, the appellant did not request the presence of his attorney and the appellant signed the customary Weingarten form. The ALJ found that the appellant's reliance on the Attorney General's Guidelines was misplaced as it was found in *In re Cox*, Docket No. A-2471-14T4 (App. Div. December 7, 2016), that those guidelines did not apply to Correction Officers. Finally, the ALJ found that the absence of an affidavit from the appointing authority in response to the appellant's cross-motion was an insufficient basis to grant the appellant's cross-motion. In this regard, he noted that the appointing authority had submitted its motion for partial summary decision, accompanied by a brief and exhibits, as well as the entirety of the record, which was more than ample for the purpose of summary decision. Accordingly, the ALJ granted the appointing authority's motion for partial summary decision and upheld the charge of falsification. However, he ordered that the penalty for falsification, the remaining charges, and arguments concerning the timeliness of the falsification charge would be addressed at the hearing.

In his initial decision, the ALJ found that based on the testimony of the appointing authority's witnesses, and the appellant, that on November 6, 2015, the appellant was called over the radio to the barbershop by Senior Correction Officer Ivonne Collazo. When he arrived at the barbershop, he found the inmate arguing with Collazo and when the inmate raised his arm, the appellant and Senior Correction Officer Brian Attardi grabbed the inmate and forcibly placed the inmate into the barber's chair, after which Collazo proceeded to "buzz" off the inmate's hair with a clipper she brought with her. The appellant then turned to Senior Correction Officer Jason Terhune who was receiving a haircut, and questioned what was happening. The appellant then left the area and returned to his escort duty. However, the ALJ found that the appellant had not punched, slapped or cut the appellant's hair. The ALJ also found that the appellant had no knowledge that the incident would occur. Consequently, aside from the previously upheld falsification charge, the ALJ dismissed the remaining charges against the appellant.

With regard to the falsification charge, the ALJ found that sufficient evidence was not presented at the hearing to warrant the dismissal pursuant to *N.J.S.A.* 30:4-3.11a. In this regard, the ALJ noted that the appellant's falsification was only apparent, at the earliest, after the May 26, 2016 interview. Therefore, the July 8, 2016 amended Preliminary Notice of Disciplinary Action (PNDA) which listed the charge of falsification was within the mandatory 45-day time limit. Moreover, the ALJ determined that the appellant's behavior was so egregious as to warrant removal. Specifically, he noted that the appellant unreservedly lied during a formal interview on March 11, 2016. Moreover, although the appellant claimed he was

assured by Collazo the matter would go away if he did not talk about the incident, such statements could not be considered either coercion or an order. Furthermore, the ALJ noted that falsification in a correctional facility strikes at the heart of correction officer's responsibility or accountability.

In his exceptions, the appellant argues that the ALJ erred in granting partial summary decision in favor of the appointing authority and denying his request for summary decision. Specifically, he argues that in response to his request for summary decision, the appointing authority failed to submit an affidavit in response. Therefore, pursuant to *N.J.A.C.* 1-1:12.5(b), he was entitled to summary decision in his favor. In this regard, he notes that since the appointing authority failed to raise any issue of material fact which controverted the appellant's request, he was entitled to a determination that the charge of falsification was untimely as it was filed beyond the 45-day time limit, and thus, should have been dismissed. The appellant maintains that he provided his first statement on March 11, 2016 during which he denied any knowledge of the incident, and the initial charges, minus the falsification charge were issued on April 15, 2016. The appellant contends that as the appointing authority had enough information to charge him regarding the underlying conduct on April 15, 2016, it certainly had enough information to charge him with falsification on that same date.

Additionally, the appellant asserts that the March 11, 2016 interview cannot be used as a basis for discipline as the interview was "constitutionally offensive." Specifically, he maintains that he was informed that he was a target of a criminal investigation on December 7, 2015, at which time he invoked his right to counsel and his fifth-amendment right from self-incrimination. He denies that he was ever told that he was no longer under criminal investigation. Instead, he asserts that he was "summoned" to an interview and "forced to answer questions under threat of termination" on March 11, 2017. The appellant maintains that he was denied the opportunity to consult with his counsel and forced to answer "nonspecific questions" about the events in November 2015. Moreover, the appellant argues that the appointing authority violated the Attorney General's Policy concerning criminal and administrative investigations.

The appellant further argues that the imposition of discipline in this matter was arbitrary and capricious. Specifically, he contends that a Correction Lieutenant involved in the incident, who is held to a higher standard, only received a 10 working day suspension. The appellant also argues that the charges of abuse of an inmate, conduct unbecoming a public employee, violation of a policy and other sufficient cause should have all been dismissed. In this regard, the appellant maintains that for the charge of violation of a policy, the charge itself lacks specificity. With regard to the other charges, the appellant argues that the appointing authority failed to submit any competent proof to support those charges. Even assuming *arguendo* that there was just cause for discipline, the appellant

argues that removal was not appropriate. Specifically, he asserts that the alleged falsification was the result of dubious interrogation tactics that violated his rights as evidenced by the fact that he provided accurate information later.

In response, the appointing authority rebuts the appellant's allegations, indicating that the ALJ properly assessed the testimony and evidence in the record and presented clear, reasonable and logical reasons for his ultimate findings and conclusions. It also argues that the appellant's cross-motion for summary decision was procedurally barred as it was filed less than 30 days before the hearing date and in the form of opposition to its motion for partial summary decision. The appointing authority asserts that with regard to the appellant's arguments concerning the Correction Lieutenant, his discipline is irrelevant to this matter as he was disciplined for a sole charge that was not a subject of this matter. The appointing authority notes that with regard to the charge of falsification, it was timely issued as it was only after the appellant's second interview on May 26, 2016 that it learned of the extent of the appellant's deception and his intent behind the deception. The appointing authority further asserts that the other charges should have also been sustained. Finally, the appointing authority argues that removal is appropriate in this matter as the appellant's actions were particularly egregious.

Based on its *de novo* review of the record, the Commission agrees with the ALJ that the charge of falsification should be upheld, the remaining charges dismissed and the appellant should be removed from employment. In his initial decision, the ALJ found, after an opportunity to assess the witnesses and their testimony, that the testimony of the appellant and the appointing authority's witnesses was credible with regard to the remaining charges. 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 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). In this case, there is nothing in the record or in the appellant's exceptions or the appointing authority's reply which convinces the Commission that the ALJ's assessment of the credibility of the appellant or the other witnesses was not based on the evidence, or was otherwise in error, or that his conclusions based on these

determinations were improper. Thus, the Commission finds that all but the falsification charge was properly dismissed.

Moreover, with regard to the charge of falsification, the Commission notes that the 45-day time period for filing disciplinary charges found *N.J.S.A.* 30:4-3.11a commences on the date on which the person filing the complaint has sufficient notice of the conduct underlying the disciplinary charges. The appellant argues that as the appointing authority determined it had sufficient information to charge him with the underlying conduct, despite his denials in the March 11, 2016 interview, then it certainly had enough information to also charge him with falsification. The Commission does not agree. The Commission agrees with the ALJ that it was only after the May 26, 2016 interview that the appointing authority had sufficient information to file the charge of falsification. It was only after the second interview that it became apparent that the appellant lied in the first March 11, 2016 interview about knowing the inmate and being involved in the incident. The Commission also does not agree with the appellant that the March 11, 2016 interview violated the constitutional protections afforded to the appellant. In this regard, the ALJ found, and the appellant does not dispute, that he was provided with his Weingarten rights and that a union representative was present during the interview. As noted by the ALJ, the appellant did not request that his attorney be present and he denied during the interview that he was being coerced.

In determining the proper penalty, the Commission's review is also *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. Moreover, 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 theory 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). Even when a Correction Officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense occurring in the environment of a correctional facility may, nevertheless warrant the penalty of removal where it compromises the safety and security of the institution, or has the potential to subvert prison order and discipline. *See Henry v. Rahway State Prison, supra*, 81 *N.J.* at 579-80. In this regard, the Commission emphasizes that a Correction Officer is a law enforcement officer who, by the very nature of his job duties, is held to a

higher standard of conduct than other public employees. *See Moorestown v. Armstrong,* 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied,* 47 *N.J.* 80 (1966). *See also, In re Phillips,* 117 *N.J.* 567 (1990). Moreover, the Commission is also mindful that:

> The appraisal of the seriousness of [the appellant's] offense and degree which such offenses subvert discipline . . . are matters peculiarly within the expertise of the corrections officials. The appraisal is subject to *de novo* review by the [Civil Service Commission], *Rahway State Prison, supra,* but that appraisal should be given significant weight. *Bowden v. Bayside State Prison,* 268 *N.J. Super.* 301, 306 (App. Div. 1993), *cert. denied,* 135 *N.J.* 469 (1994).

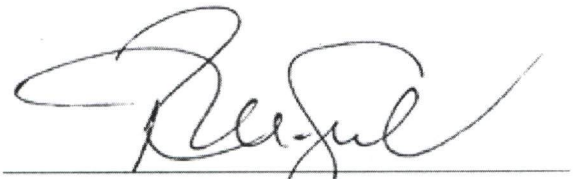
In the instant matter, the appellant blatantly lied in an interview about his knowledge of and involvement in the alleged abuse of an inmate. Although the appellant was ultimately determined not to have abused an inmate, his failure to provide a factual and accurate statement during the interview was sufficiently egregious, in and of itself, to support his removal. *See In the Matter of Anthony Carter,* Docket No. A-2599-03T2 (App. Div. March 14, 2005) (Senior Correction Officer, who intentionally falsified material information on his employment application when he indicated that he was unemployed during a period of time when he was actually terminated from his position with a county detention center in Maryland, removed rather than suspended). Although the appellant argues that removal is too severe since the Correction Lieutenant only received a 10 working day suspension, the Commission does not agree. In this regard, the Commission determines the appropriate penalty based on the particular circumstances and, absent compelling circumstances, will not compare the penalty in a separate matter. In this matter, the egregiousness of the appellant's misconduct clearly warrants removal from such a safety sensitive law enforcement position, regardless of his prior disciplinary history. Accordingly, the foregoing circumstances provide a sufficient basis to uphold the removal.

ORDER

The Civil Service Commission finds that the appointing authority's action in imposing a removal was justified. Therefore, the Commission affirms that action and dismisses the appellant's appeal.

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 20TH DAY OF SEPTEMBER, 2017



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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 16631-16

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

David J. Heintjes, Esq., for appellant Steven Hotz

Emily M. Bisnauth, Deputy Attorney General, for respondent Garden State Youth Correctional Facility (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: June 9, 2017 Decided: July 11, 2017

BEFORE **JOSEPH LAVERY,** ALJ t/a:

STATEMENT OF THE CASE

This is an appeal by **Steven Hotz, appellant**, challenging his termination from the position of Senior Correction Officer (SCO), Garden State Youth Correctional Facility. The grounds for his removal were (a) abuse of an inmate, and (b) falsification.

Respondent appointing authority, Garden State Youth Correctional Facility, New Jersey Department of Corrections (Garden State) contests the appeal and asks that all charges be affirmed and that the penalty be upheld.

Today's initial decision:

(a) incorporates by reference the partial summary decision order upholding the charge of falsification[1],
(b) dismisses the charge of inmate abuse, and
(c) affirms the removal of appellant from employment solely on the charge of falsification.

Procedural History:

This case was filed in the Office of Administrative Law (OAL) on October 27, 2016. The Acting Director and Chief Administrative Law Judge on December 1, 2016, appointed the undersigned to hear this case in the capacity of temporary administrative law judge, who convened a prehearing conference on December 15, 2016, and set hearing dates. Adjournments to accommodate motions followed[2]. On January 18, 2017, oral argument was heard.[3] On March 24, 2017, an order issued granting respondent's motion for partial summary decision, and denying appellant's cross-motion for partial summary decision. Plenary hearing convened on March 28, March 29[4], and April 11, 2017. An order settling the record was promulgated on May 24, 2017. On June 9, 2017, the last summation was filed in the OAL. On that date, the record closed.

Background:

Appellant, Steven Hotz, served as a Correction Officer and, later, as a Senior Correction Officer in the New Jersey Department of Corrections for a period of approximately ten years. The appointing authority now seeks affirmation of their termination of his employment. The event which triggered his final discipline occurred initially on November 6, 2015, when appellant took part in the debasement of an inmate

[1] Order granting respondent's motion for partial summary decision and denying appellant's cross-motion for partial summary decision (March 24, 2017).
[2] Appellant waived his 180-day disposition rights under N.J.S.A. 40A:14-200 by letter of January 11, 2017.
[3] See letter of the administrative law judge dated January 19, 2017, and e-mail to Marianne Hatrak dated May 3, 2017.
[4] On the hearing date of March 29, 2017, the audio recording system failed. Testimony was reconstructed from the collective notes of counsel and the administrative law judge.

barber, Edwin Lopez. For this he was subjected to charges arising from physical and mental abuse of an inmate. (Exhibit R-1A.) Whether his actions were knowing and intentional is in issue before this tribunal today. In any event, the fallout from that episode worsened when appellant lied about what took place in the first of two subsequent investigatory interviews by the agency's Special Investigation Division (SID). This deception caused the amendment of the charges to include that of falsification. (Exhibit R-1B.)

On the charge arising from falsification, the largely uncontested facts were discussed and, in part, decided by an earlier order of this tribunal granting respondent Garden State partial summary decision[5]. The material factual background decided in that order still may usefully serve, in part, for today's purposes:

> The facts which the appointing authority proffers as undisputed involve alleged mistreatment of an inmate. Garden State relates that an inmate, E.L., was restrained in a barber chair, and his hair was cut off against his will. It maintains further that during the first investigatory interview of March 11, 2016, by SID investigators which followed, appellant repeatedly denied any knowledge of the inmate and of the incident, and categorically denied any participation in it. During questioning, according to Garden State, appellant answered that it was possible others had "made up a story," untruths which had happened before. Nevertheless, unpersuaded by appellant, on April 15, 2016, the appointing authority charged him with conduct unbecoming a public employee, physical or mental abuse of an inmate and other sufficient causes. (Respondent's Exhibit 9.)
>
> Afterwards, the appointing authority contends, in a second, supplementing SID interview held on May 26, 2016, appellant altered his position on the facts. Shown a photo of the inmate, appellant admitted knowing him. Further, appellant now conceded that he took part in the episode in the barbershop on November 6, 2015, albeit, in his version of events, only to the extent of physically calming the inmate. The latter had raised his arm in a movement suggesting threat. Appellant conceded that he and SCO Attardi had forcibly placed the inmate in a barber's chair, but blamed SCO Collazzo for a buzzed haircut which then occurred. Finally, in this same interview, appellant added that on the day of the incident, he and SCO Collazzo had discussed the event, but that she advised him not to say or do anything about it. She counseled that she had been assured that nothing would happen to them if they stayed silent.

[5] See footnote 1.

> Armed with this supplementing information, the appointing authority compared the two separate visually recorded statements and found that appellant had engaged in falsification. On July 8, 2016, it therefore issued an amended preliminary notice of disciplinary action charging him with falsification. (Respondent's Exhibit 9.) Eventually, appellant was removed by final notice of disciplinary action dated September 30, 2016. (Respondent's Exhibit 10.) . . .
> [Id at 2-3].

Against this background, the current appeal is brought, and the parties presented their cases at hearing solely as they related to the charge of abusing an inmate:

Arguments of the parties:

Respondent appointing authority's case:

With partial summary decision now granted on the issue of falsification, Garden State addressed the remaining charge of inmate abuse. It did so through testimony of witnesses accompanied by exhibits and through submission of post-hearing written summations:

The sole eyewitness testimony proffered by the appointing authority was that of **SCO Jason M. Terhune,** an SCO who had been working in the institution for only four months into his probationary period after completing his academy training when he saw what took place with inmate Edwin Lopez. SCO Terhune stated that, at the time, he was still trying to familiarize himself with the local protocols. On November 6, 2015, the SCO recalled, he had entered the barber shop where officers received their haircuts. At some point between 11:00 a.m. and 1:00 p.m. he had gone there during his half-hour break. Inmate James Traylor was cutting his hair. While seated in the chair, inmate Edwin Lopez entered and seated himself in a chair used for those waiting. SCO Ivonne Collazo followed.

SCO Terhune recalled that SCO Collazo confronted inmate Lopez, giving him a choice between getting his hair cut in retaliation for a poor haircut given Lieutenant Ervin, or being placed in lockup. She indicated that this was at the behest of Lieutenant Ervin, and said "What the lieutenant wants, the lieutenant gets." This seemed an odd

statement in SCO Terhune's judgment. Appellant was not present at the time. Afterward, despite his having declined the haircut option, SCO Terhune said, SCO Collazo nevertheless called for assistance on Terhune's lapel phone. She intended to give the haircut anyway. SCOs Attardi and appellant responded within three minutes.

SCO Terhune additionally stated that SCO Collazo directed that the two officers place the inmate in a barber chair, and both complied, keeping the inmate restrained with his arms somehow held behind. The inmate had not been seated willingly. SCO Terhune remembered that appellant had at one point looked at him, "lipping" something which SCO Terhune could not understand but which seemed to indicate appellant's state of confusion. Once in the chair, SCO Collazo gave the inmate a buzz cut, using clippers which SCO Terhune believed she had brought with her. Both appellant and the second SCO, Officer Attardi, then released the inmate from the barber chair and left the shop.

SCO Terhune testified that he had not witnessed any violence by appellant against the inmate. Specifically, he had not seen SCO Attardi smack the inmate in the face or in the back of the head, and he had not observed appellant strike the inmate elsewhere on his body. Notwithstanding, after the haircut, the inmate sat with his head down, and was red-faced with embarrassment or anger. SCO Collazo told him she would allow the repair of his haircut by another inmate. Appellant and SCO Attardi left.

All this took place, in SCO Terhune's estimation, in only a fraction of the time during which he continued to receive his own haircut from the regular barber, inmate Traylor. He himself was there for less than thirty minutes. The precise time frame of appellant's presence in the barbershop, SCO Terhune did not feel comfortable estimating. SCO Terhune was certain that the only persons present during the episode with the inmate were himself, inmate Traylor who was cutting his hair, Inmate Lopez, SCO Attardi and SCO Collazo.

Relying on his report (Exhibit R-4.)[6] to serve as his direct testimony preliminary to cross-examination, **Roy Becker-Rowley**, **Senior Investigator**, **Special Investigations Division (SID)** recalled his part in the review of appellant's actions. He noted that he was not the primary investigator. His role was only to collect basic information after receiving an allegation from the Ombudsman. (Exhibit A-51.) The information forwarded and his later investigation, including interviews with the inmate, appellant and numerous correction officers, civilian and inmate witnesses, collectively was comprised of statements alleging that inmate Lopez had been set upon by two correction officers, SCO's Attardi and appellant. These statements included assertions that the two officers had beaten the inmate and had forced him into a barber chair, while three other officers watched. In the course of the attack by the two, according to the inmate himself, his head had been shaved by SCO Collazo as retaliation for his having given Lieutenant Harry Ervin a "bad" haircut. The clippers used had been obtained from outside the barbershop.

Afterwards, Investigator Becker-Rowley reported, the inmate had been treated in the infirmary, but had been released with continuing complaints of rib and back pain. Investigator Becker-Rowley stated in testimony that he had seen no sign of injury when interviewing the inmate in the infirmary. However, an injury report form (Exhibit R-27.) was issued by the infirmary. It recorded minimal redness of Inmate Lopez's right scapular area and complaints by the inmate of pain in the same shoulder.

According to the report of Investigator Becker-Rowley, later that day, the inmate had been visited by SCO's Paul Walker and George Davino, and the following day by CO Sergeant Kory Acchione. All asked about the event, and inquired about the inmate's intended response. Now concerned that he would be further abused, Inmate Lopez formally reported the incident, and indicated a willingness to take a lie detector test. Investigator Becker-Rowley himself was not present during the incident in issue, or during any of the events or times covered by those he interviewed.

[6] Completed November 12, 2015.

In additional testimony, the investigator principally responsible for scrutiny of the event, **Kurt Rocco, Sr. Investigator, SID**, also acknowledged his reports as his direct testimony. (Exhibits R-5, R-6 and R-7.) The investigator emphasized that his role was only to collect information, not to conclude as to guilt. Like Senior Investigator Becker-Rowley, he, too, had not personally observed any aspect of what had occurred before or during the incident.

Senior Investigator Rocco's first report (Exhibit R-5.), was submitted on April 13, 2016. It thoroughly and extensively summarizes the results of his interviews with witnesses thought to have been involved prior, during, and after the barbershop incident on November 6, 2015, from which the charges against appellant arise. (Exhibits R-1A, R-1B and R-1C.) That information ended in a major disciplinary suspension of Lieutenant Ervin. The information gathered concerning the actions of appellant, SCO Attardi and SCO Collazo in the barbershop ended in their termination as correction officers. With the exception of SCO Terhune, none of the persons interviewed by the appointing authority, on the basis of whose collective testimony disciplinary charges eventually issued, were called by the State to testify at hearing.

The investigator recorded in his first report that he had interviewed appellant on March 11, 2016, with Principal Investigator Edward Soltys. Appellant signed the Weingarten Rights form and had a union representative present. The interview was taped. (Exhibit R-16.) As noted in the order granting partial summary decision, on that date, the appellant denied any involvement with Inmate Lopez's mistreatment. He could not recall whether he had been in the barber shop on November 6, or where his work assignment was that day. According to investigator Rocco, appellant specifically denied knowing Inmate Lopez, denied being summoned to the barber shop, denied forcibly placing Inmate Lopez in the barber chair, witnessing SCO Attardi doing so, or witnessing SCO Collazo cutting the inmate's hair.

After appellant retained counsel, Senior Investigator Rocco, with Principal Investigator Edward Soltys, again interviewed appellant on May 26, 2016. (Exhibits. R-6, R-17.) As with the earlier interview, the requisite legal preliminaries were observed, including video-taping. This time the interview included the presence of counsel rather

than a union representative, compliance with Garrity rights, and provision of use immunity. At that time, it is reported, appellant described in full his version of what had occurred on November 6, 2015. This account differed entirely from his lengthy denial of involvement documented in investigator Rocco's earlier report. (Exhibit R-5.)

Finally, according to officer Rocco's testimony and report, based in part on the video of the second interview, appellant now stated that he had, in fact, taken part in the haircut of inmate Lopez. He had responded to a two-way radio summons from SCO Collazo to come to the center. He had no knowledge of why he was being called, since he had been on escort duty elsewhere. On arrival at the barber shop where he saw SCO Collazo, he found inmate Lopez in an agitated state confronting SCO's Attardi and Collazo, and in reaction to the inmate's raised arm suggesting resistance, he and SCO Attardi forcibly placed the struggling inmate into a barber's chair. To his surprise, SCO Collazo then passed clippers she was holding over the inmate's head, in a single-pass "buzz" cut.

Senior Investigator Rocco reported that appellant denied foreknowledge that SCO Collazo had planned this action. Appellant recalled that he had expressed alarm contemporaneously by turning to SCO Terhune and by saying "What the fuck is this about!" Once this occurred, appellant stated, he left immediately to return to the duty station he had left. Appellant denied that he or SCO Attardi during this unexpected turn of events had struck or in any other way abused the inmate.

In post-hearing written summation, Garden State recounted testimony and facts of record, arguing that the application of law to these facts required decision for the State. It maintained that the facts demonstrated conduct unbecoming an employee through abuse of an inmate. The facts also demonstrated appellant's unlawful conspiracy with another officer to thwart an investigation, and revealed failure of appellant to do his duty to help the victimized inmate. Appellant's special status as a law enforcement officer therefore demands his termination, the State maintains.

Appellant's case in reply:

Appellant denied the charge of inmate abuse. He adopted as his direct testimony his video-recorded interview of May 26, 2016 (Exhibit R-17.) during which he asserted that he was wholly unaware of why he had been radioed twice by SCO Collazo to report to center. The contents of that interview were also summarized without material contradiction of record in Senior Investigator Rocco's report, supra (Exhibit R-6, at DOC 202-204.) and under the heading herein, "Respondent appointing authority's case."

Additionally, in this same interview, appellant emphasized that he had no prior knowledge of any controversy involving Lieutenant Irvin's haircut. When he responded to the radio call from SCO Collazo, he first saw her at the barber shop, as he was descending nearby stairs from his duty assignment as an escort to a civilian technician. He had no idea of what assistance was needed by SCO Collazo. However, when he reached her, he found inmate Lopez in the shop engaged in a heated "in-your-face" confrontation with SCO Attardi. This appeared to him as a threatening development. When the inmate raised his arm, appellant grasped it. With SCO Attardi, he forcibly placed the inmate in a barber chair, restraining him to end what appellant saw as an incipient altercation. While in the process, he spoke to the inmate in attempt to calm him. It was then that the buzz-cut by SCO Collazo occurred.

Taken by surprise, appellant remembered, he commented to SCO Terhune, who was still in the next receiving a haircut: "What the fuck is this?" Officer Terhune merely shrugged. Appellant stated that he immediately left to return to his escort duty assignment. He estimated his time in the shop as lasting approximately thirty seconds. The time taken to reach the barber shop took approximately three minutes..

He explained that his request to amend his March 11, 2016, answers concerning the incident on November 6, 2015, was motivated by his need to do the right thing. He noted that he had spoken to SCO Collazo after the barber shop event, demanding to know why she had called him at all, drawing him into this "shit-storm." Appellant conceded that she should not have. He stated further that before the first SID interview, he had been assured by SCO Collazo that she herself had spoken to Major Paladino, a

life-long acquaintance. The latter, according to SCO Collazo in several subsequent conversations with appellant, had assured her that all would be well. She said the problem raised by the inmate's complaint would go away if appellant would follow the major's instructions to "just play ball" and "be quiet." After a six-month transfer he would be returned to Garden State. Appellant insisted that, being sensitive to his family responsibilities, his previous denials to investigators in the first videoed interview had been an effort to not get involved.

Appellant could not recall if handcuffs had been used, or if a code had been called. He did agree that there had been restraint of the inmate, and that, after the buzz-cut, the latter had appeared depleted and slumped. Appellant stated that once the cut was concluded, he himself left.

Being called as appellant's witness, **Senior Investigator Rocco** acknowledged that his office had forwarded the case to the prosecutor's office for criminal charge assessment. After review, that office declined to move on criminal charges, so advising SID on March 8, 2016. (Exhibit A-30.) He stated that he knew nothing about the status of use immunity. As to guilt, the investigator declared that his role was to collect, not conclude.

For his part, **Lieutenant Harry Irvin, Jr.** testified that he was on duty on November 5 and 6, 2015. However, he had not ordered a haircut for inmate Lopez. The lieutenant disclosed that he had been given a ten-day suspension nonetheless.

In corroboration of appellant's testimony, **SCO Kevin A. Rodriquez** confirmed that he had unexpectedly relieved appellant to act as custody escort of a civilian technician, and that appellant had returned within approximately five minutes.

The Administrator of Garden State, **Derrick Loury**, recalled in testimony that he had received an ombudsman's referral. (Exhibit A-51.) Additionally, he knew that afterward a report was submitted to him in early spring of 2016 (Exhibit R-5.), and that it was this report which prompted his discipline of appellant. (Exhibit R-1A.) After the second SID interview, the charge of falsification was added. (Exhibit R-1B.)

In post-hearing written summation, appellant summarized testimony, proposed findings of fact, and argued the law. He maintained that the charges were insufficiently specific. As such they were unconstitutional for lack of due process. Further, the charge of falsification was not timely filed within the forty-five-day period envisioned by N.J.S.A. 30:4-3.11a, and should be dismissed. Additionally, appellant states, the charges were arbitrary and capricious, in violation of civil service law. There is no evidence of his physically or mentally abusing the inmate, there is no substantiation of conduct unbecoming an employee, or of violation of any other rule, regulation, policy, procedure, order or administrative decision. Finally, appellant argues, if discipline is to be imposed, a lesser penalty is appropriate in view of a minimal past discipline history over ten years of employment.

FINDINGS OF FACT

To resolve disputes of material fact, I make the following **FINDINGS:**

1. On November 6, 2015, appellant was called over the radio for immediate assistance by SCO Ivonne Collazo.
2. Appellant was not told by SCO Collazo the reason for her request, nor did he know what that reason was.
3. Appellant, on duty serving as an escort for a civilian, asked a passing officer, SCO Kevin Rodriguez to relieve him.
4. Appellant descended a stairway to find SCO Collazo motioning him into the Correction Officers' barber shop, just beneath.
5. Entering the shop, he found inmate Edwin Lopez arguing heatedly face-to-face with SCO Attardi. Appellant did not understand the cause of the argument.
6. On reaching the arguing pair, sensing resistance to an officer, appellant caught the inmate's hand when he raised it, and the two officers forced him into a barber chair, restraining his arms behind him, while SCO Collazo imposed a rapid pass-over "buzz" cut, with scissors she had brought with her to the barber shop.

7. Surprised, appellant turned to SCO Jason M. Terhune whose hair was being cut nearby, and projecting a visible affect of confusion, said to the officer: "What the fuck is this?!"
8. The inmate slumped in the chair, in a "depleted" state, and was released.
9. At no point did appellant punch or slap the inmate or cut his hair off.
10. Appellant then immediately left and returned to his escort duty, relieving SCO Rodriguez.
11. The total time of his absence from his escort assignment was approximately five minutes.
12. Appellant had no foreknowledge of SCO Collazo's intention to buzz-cut inmate Lopez, nor of the background to it, and left quickly thereafter to avoid further involvement.

LEGAL ANALYSIS AND CONCLUSION

Burden of persuasion:

The burden of persuasion falls on the agency in enforcement proceedings, such as those in which it is sought to prove an employee has engaged in violations susceptible to removal as a penalty, under controlling regulations, Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The agency must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings, Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to a given conclusion, Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958). 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).

The Charges:

This case involves a penalty. Where punishment is sought, the words of the charges brought to justify it must be strictly construed. There can be no departure from their boundary in the trial of fact or application of law. Any decision must arise from the plain meaning of the charges' words. For that reason, the State's post-hearing accusations of conspiracy with SCO Collazo and failure to come to the aid of inmate Lopez after his buzz cut will not be evaluated.

The basic charge of falsification will likewise not be considered here. That was decided in the summary decision order already cited. Notwithstanding, appellant was permitted in that order to provide at subsequent plenary hearing any facts which he believed would demonstrate violation of N.J.S.A. 30:4-3.11a. At that hearing, no preponderating evidence was entered into the record which would demonstrate that the falsification charge should be dismissed pursuant to N.J.S.A. 30:4-3.11a. As has been known from the outset, appellant's falsification was apparent at the earliest only after the May 26, 2016, videoed interview. The specifics of that charge, based on the most plausible facts show that an amended version of the preliminary notice was served on July 8, 2016. (Exhibit R-2, FNDA 9-30-16.) Consequently, the falsification charge was filed within the statutorily-mandated forty-five days thereafter.

To evaluate the remaining issue of inmate abuse it is useful to print the relevant specifics of the charges here, verbatim:

> On or about November 8, 2016 an incident occurred wherein physical force was used against an inmate. This action led to an SID investigation That revealed the following. Officer Steven Hotz was one of 3 Officers who did physically abuse the inmate in the Garden State Youth Correctional Facility Staff Barbershop; specifically, by holding him down in the barber chair, punching and slapping him, and cutting his hair off. This constitutes conduct unbecoming, physical abuse of an inmate and a violation of law enforcement rules, policies, and procedures. Total disregard was given as it pertains to the policy as set forth in the Law Enforcement Officers Handbook as well as the NJDOC employee handbook. Additionally, SCO Hotz did provide a supplemental interview with the NJDOC Internal Affairs Units, in which he admitted to providing false information during the initial interview.

[Exhibit R-2; Final Notice of Disciplinary Action (31-B).]

The Civil Service Rules and the Human Resources Bulletin cited therein as "Sustained Charges" were N.J.A.C. 4A:2-2.3(a)6, Conduct Unbecoming A Public Employee; N.J.A.C. 4A:2-2.3(a)12, Other Sufficient Cause; HRB 84-17C.3. Physical or mental abuse of an inmate, patient, client, resident, or employee; HRB 84-17C.8. Falsification: Intentional misstatement of material fact in connection with work, employment, application, attendance, or in any record, report, investigation or other proceeding.

As has been noted, the appointing authority has already demonstrated that appellant violated those regulations forbidding falsification[7]. However, in the remainder of the case it has not demonstrated by a preponderance of evidence that appellant abused inmate Edwin Lopez. The sole eyewitness, SCO Jason M. Terhune corroborated appellant's claim of confusion over what took place in the barber chair when SCO Collazo cut the inmate's hair. SCO Terhune also credibly stated that he did not see appellant strike the inmate, nor did he see SCO Attardi hit him in the face or back of the head. The State's sole eye-witness thus provided testimony more exculpatory than damaging.

Appellant himself testified similarly. Mindful of the wise legal maxim: "False in one, false in all," his statements must be carefully scrutinized. Nonetheless, his demeanor is forthright and consistent during his second videoed interview of May 26. (Exhibit R-17.) It meshes with his persuasive (albeit ineffective) defense that his earlier falsification arose from the urging and assurances of a high-ranked officer, conveyed to him by SCO Collazo.

[7] See footnote 1.

SCO Rodriguez, was not shown to have any interest in the outcome of the case. In his testimony, he limited appellant's absence to about five minutes. He was fully credible. The serendipity of SCO Rodriquez's appearance, his happenstance relief of appellant, and appellant's brief, five-minute absence fits within appellant's claim, i.e., he was pulled into the barbershop fray without prior planning on his part, and without a formulated intent to abuse inmate Lopez. Alarmed by SCO Collazo's act, he left at once.

It is true that the appointing authority provided testimony from fully professional and credentialed investigative officers: Senior Investigator Rocco and Senior Investigator Becker-Rowley. Their reports and testimony were meticulous. The accompanying documentation (Exhibits R-4, R-5, R-6 and R-7.) summarized extensively their witness interviews. Nevertheless, this data describes a factual backdrop extending well beyond that underlying the narrow charges against appellant quoted supra. Understandably, neither investigator could personally say he was present at the scene in issue. Yet, to offset this lack no eyewitness inmate or correction officer interviewee but SCO Terhune was called by the State to testify. Consequently, the investigatory record compiled, insofar as it bears on the charges, and with the exception of appellant's two videoed interviews, is today held as being without evidentiary weight. It is hearsay unsupported by competent evidence. N.J.A.C. 1:1-15.5.

Conclusion:

I CONCLUDE, from the above analysis, that the preponderating evidence with respect to the charge of inmate abuse (Exhibit R-2.) is that presented by appellant. For this reason, this charge (though not the charge of falsification) should be **DISMISSED.**

PENALTY

The weighing of suitable penalty is an inapplicable inquiry with respect to the dismissed charge of inmate abuse. However, the question of appropriate penalty for the charge of falsification, upheld earlier through summary decision, remains to be determined.

For the reasons which follow, appellant's removal for egregious falsification must be affirmed, without regard to the doctrine of progressive discipline, In re Hermann, 192 N.J. 19, 36 (2007).

It is well-settled judicial and administrative case law that police officers specifically and sworn law enforcement officers generally are special government officers. Misconduct anywhere in public service is objectionable. Yet, when it takes place in law enforcement, the level of seriousness is significantly enhanced. In a leading case, our superior court has held:

> A police officer is a special kind of public employee. His primary duty is to enforce and uphold the law . . . He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have respect of the public.
> [Twp. of Moorestown v. Armstrong, 898 N.J. Super. 560, 566, 215 A.2d 775 (App. Div. 1965), certif. denied, 47 N.J. 80, 219 A.2d 417 (1966)]

Correction officers are law enforcement officers. Removal in circumstances comparable in seriousness to the instant matter is not unusual. In the case of In re Carter, 191 N.J. 474, 485-486 (2007), affirming removal of an officer who slept while on duty, the Court held:

> In matters involving discipline of police and corrections officers, public safety concerns may also bear upon the propriety of the dismissal sanction. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580, 410 A.2d 686 (1980) (affirming appellate reversal of Board decision to reduce penalty from dismissal to suspension for prison guard who falsified report because of Board's failure to consider seriousness of charge); In re Hall, 335 N.J. Super. 45, 51, 760 A.2d 1148 (App. Div. 200) (reversing Board's decision to reduce penalty imposed on police officer for attempted theft from dismissal to suspension), certif. denied, 167 N.J. 629, 772 A.2d 931 (2001); Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06, 633 A.2d 577 (App. Div. 1993) (holding that it was arbitrary, capricious, or unreasonable to reduce penalty from removal to six months suspension for prison guard who gambled with inmates for cigarettes), certif. denied, 135 N.J. 469, 640 A.2d 850 (1994).

It is also true that the appropriateness of progressive discipline attends the circumstances of the offense. Where the violation is sufficiently serious, the violation per se could be enough to warrant disregard of the graduated discipline concept. This was

discussed in IMO Ruby Saunders, CSR 15250-13 April 14, 2014): In re Saunders, CSR 15250-13, Initial Decision (April 14, 2014), <http://njlaw.rutgers.edu/collections/oal/>, aff'd, CSC (July 16, 2014), <http://www.state.nj.us/csc/about/meetings/search/index.html>.

> Appellant is without any record of discipline during the brief period of her employment as a Correction Officer Recruit. She has one record of commendation for attention to detail in searches (Exhibit N). It is not disputed that her single counseling for raising her voice and speaking over a supervisor, Ibid, does not qualify as a discipline but, is rather, an instruction.
>
> Ordinarily, any penalty would be considered within the context of an employment history of discipline, or lack of it. West New York v. Bock, 38 N.J. 500, 523 (1962). Nevertheless, this progressive discipline policy is not inflexible. It is a concept which may be set aside when the offense under consideration is sufficiently egregious. In re Stallworth, 208 N.J. 182, 199 (2008).
>
> In appellant's case, the level of seriousness accompanying the offenses charged is enhanced by her law enforcement title. The reported judicial case law is replete with recognition of the special nature of that status, with respect for the unusually great responsibilities imposed on law enforcement, and with affirmance of the strict accountability demanded of an officer:
> [Id at 18-19]

In the instant case, appellant lied unreservedly during a formal SID investigatory interview. (Exhibit R-16.) It cannot be claimed that he was ordered to do so by Major Paladino. The two apparently never spoke concerning the incident. Appellant instead relied on the second-hand assurances of SCO Collazo that the incident would fade away if appellant did not tell the truth. Her persuasion can hardly be held as coercion. Neither can this rationale of appellant justify blatant falsification. His act was clearly in violation of the rules cited by the appointing authority.

Falsification in the setting of a correctional facility such as Garden State strikes at the heart of a correction officer's responsibility and accountability. He or she is an integral actor in a paramilitary organization, subject to its regulatory code and the orders of superiors. Superior officers must depend on the honesty of their subordinates to

maintain good order in a dangerous environment. Fellow correction officers must have confidence that they can rely on the truth of information dispensed by their colleague. Such certainty is essential. It is fundamental to secure law enforcement cooperation during those work demands which place at risk officer and inmate safety. Appellant's demonstrated dishonesty threatens this arrangement. For all these reasons, termination is appropriate.

ORDER

I **ORDER** therefore **(a)** that the charge of inmate abuse be **DISMISSED,** but **(b)** that the **removal** of appellant from his position of Senior Correction Officer be **AFFIRMED,** based on the previous finding of falsification through an order of partial summary decision.

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.

July 11, 2017
DATE

Joseph Lavery
JOSEPH LAVERY, ALJ t/a

Date Received at Agency: 7-11-17

Date Mailed to Parties: 7-11-17

mph

WITNESSES

For appellant:

Steven Hotz
Kurt Rocco
Harry J. Ervin, Jr.
Kevin A. Rodriguez, Jr.
Derrick Loury

For respondent:

Jason M. Terhune
Roy Becker-Rowley
Kurt Rocco

EXHIBITS

For appellant:

A-3 Witness Acknowledgment Form: Jason Terhune
A-12 Weingarten rights form; PNDA 4/15/16; 5/14/16
A-14 Memo from Tad Drummond to Edward Soltys, March 8, 2016
A-16 Photograph: Steven Hotz
A-25 PNDA 4/15/16
A-30 Daily Authorized Visitor List
A-51 Memo: Melissa Matthews, Assistant Ombudsman, dated 11/10/2015
A-52 Initial Decision and Final Administrative Decision, November 30, 2015
A-53(a) Proffered hearing notes for March 29, 2017
A-53(b) Objections to respondent's hearing notes

For respondent:

R-1a PNDA 4/15/16 Steven Hotz

R-1b Amended PNDA 4/15/16 Steven Hotz

R-1c Amended (2) PNDA 4/15/16 Steven Hotz

R-2 FNDA 9/30/16 Steven Hotz

R-4 Interoffice Communication: Roy Rowley to Salvatore Leto

R-5 Report; Kurt Rocco 12/09/2015

R-6 Supplemental Report Kurt Rocco 06/09/2016

R-7 Supplemental Report Kurt Rocco 07/28/2016

R-9 Handbook of Information and Rules NJDOC

R-10 Law Enforcement Personnel Rules and Regulations NJDOC

R-11 HRB 84-17

R-15 Work History, Steven Hotz.

R-16 First SID interview, Steven Hotz (DVD)

R-17 Second SID interview, Steven Hotz (DVD)

R-18a Photograph

R-18b Photograph

R-18c Photograph

R-22 Photo: Steven Hotz

R-27 Injury Report Form: Edwin Lopez 11/15

R-29 FNDA 9/30/16; PNDA 3/11/2014; Settlement Agreement: 8/12/08

R-30(a) Proffered hearing notes of respondent for March 29, 2017

R-30(b) Objections to appellant's proffered hearing

3.24.2017

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING RESPONDENT'S MOTION FOR PARTIAL SUMMARY DECISION AND DENYING APPELLANT'S CROSS-MOTION FOR PARTIAL SUMMARY DECISION

OAL DKT. NO. CSR 16631-16

IN THE MATTER OF STEVEN HOTZ, GARDEN STATE YOUTH CORRECTONAL FACILITY, DEPARTMENT OF CORRECTIONS.

David J. Heintjes, Esq., for appellant Steven Hotz

Emily Bisnauth, Deputy Attorney General, for respondent Garden State Youth Correctional Facility (Christopher S. Porrino, Attorney General of New Jersey, attorney)

BEFORE **JOSEPH LAVERY,** ALJ t/a:

The Motions:

The **appointing authority, Garden State Youth Correctional Facility (Garden State), respondent**, in response to appellant's appeal from his termination as a Senior Corrections Officer, brings this motion for partial summary decision. It contends there are no material facts

in dispute concerning a charge of falsification. Further, it opposes appellant's cross-motion for partial summary decision.

Appellant, Steven Hotz, brings a cross-motion for partial summary decision asking for dismissal of the charge for constitutional and statutory reasons, as well as because of underlying factual circumstances showing violation of the Attorney General's Guidelines. All these legal flaws cited in defense raise material issues of fact, barring summary disposition, he argues. Appellant also opposes the appointing authority's motion for partial summary decision.

The appointing authority's motion and argument in opposition:

Respondent **Garden State** in the main relies on a comparison of two videoed Special Investigation Division (SID) interviews to support its motion. The first interview was held on March 11, 2016, the second on May 26, 2016. Respondent argues: (a) that appellant gave false and misleading statements to investigators in the first interview, (b) that appellant later admitted to false statements made then, (c) that appellant knew this behavior was prohibited by policy and rules, and (d) that removal for this conduct is supported by precedent.

The facts which the appointing authority proffers as undisputed involve alleged mistreatment of an inmate. Garden State relates that an inmate, E.L., was restrained in a barber chair, and his hair was cut off against his will. It maintains further that during the first investigatory interview of March 11, 2016, by SID investigators which followed, appellant repeatedly denied any knowledge of the inmate and of the incident, and categorically denied any participation in it. During questioning, according to Garden State, appellant answered that it was possible others had "made up a story," untruths which had happened before. Nevertheless, unpersuaded by appellant, on April 15, 2016, the appointing authority charged him with conduct unbecoming a public employee, physical or mental abuse of an inmate and other sufficient causes. (Respondent's Exhibit 9.)

Afterwards, the appointing authority contends, in a second, supplementing SID interview held on May 26, 2016, appellant altered his position on the facts. Shown a photo of

the inmate, appellant admitted knowing him. Further, appellant now conceded that he took part in the episode in the barbershop on November 6, 2015, albeit, in his version of events, only to the extent of physically calming the inmate. The latter had raised his arm in a movement suggesting threat. Appellant conceded that he and SCO Attardi had forcibly placed the inmate in a barber's chair, but blamed SCO Collazzo for a buzzed haircut which then occurred. Finally, in this same interview, appellant added that on the day of the incident, he and SCO Collazzo had discussed the event, but that she advised him not to say or do anything about it. She counseled that she had been assured that nothing would happen to them if they stayed silent.

Armed with this supplementing information, the appointing authority compared the two separate visually recorded statements and found that appellant had engaged in falsification. On July 8, 2016, it therefore issued an amended preliminary notice of disciplinary action charging him with falsification. (Respondent's Exhibit 9.) Eventually, appellant was removed by final notice of disciplinary action dated September 30, 2016. (Respondents Exhibit 10.)

Addressing the rule authorizing full and partial summary decision, N.J.A.C. 1:1-12.5, respondent appointing authority maintains it could identify no genuine issue of material fact with respect to the falsification charge. Additionally, it argues that appellant has not supplied a responding affidavit showing a genuine issue of fact. Therefore, viewing the case in the light most favorable to the moving party, Garden State insists that a rational fact-finder could only resolve the dispute in its favor, citing relevant opinions of both the New Jersey and the United States Supreme Courts. Moreover, the appointing authority states, once it is granted partial summary decision for falsification, case law also compels termination as a penalty.

In its brief in opposition to appellant's cross-motion, the appointing authority offered further rationale for its position. It stressed that in the March 11, 2016, interview appellant denied knowledge of every detail he was questioned on, ranging from his presence in the barber shop, to recollection of who might have been there and their activities, through forced placement of the inmate in the barber's chair, and finally to the involuntary haircut while being

held by himself and his fellow corrections officer, SCO Attardi. Yet, on May 26, 2016, appellant recanted on every topic touched. In its view, this was falsification.

Garden State believes appellant's defenses are specious, and none support denial of its motion for partial decision. Fear of job loss would not excuse lying. During the March 11 interview appellant denied he had been threatened, when questioned during the interview. He explained that he falsified because of jail rumors that the case was "going nowhere," and because SCO Collazzo had advised him to do nothing.

The appointing authority counters appellant's briefed criticisms by noting that it is not compelled by N.J.A.C. 1:1-12.5 to submit a supporting affidavit with its motion for partial summary decision, that it has clearly specified the rules and regulations violated, and that its motion is based not on hearsay, but on the evidentiary record, including especially appellant's videoed interview statements.

Garden State denies that any protections to be afforded in a criminal investigation were denied appellant. It notes that after counsel demanded them by letter in December of 2015, they were provided, so long as the criminal investigation existed. When notified on March 8, 2016, by the Burlington County Prosecutor's office that the criminal investigation had ended, the appointing authority moved immediately to conduct an administrative interview. They did so on March 11, 2016. Appellant's union representative was present. He was advised that the proceeding was administrative, and given the usual Weingarten protections, as proven by the acknowledgement form which he signed (Respondent's Exhibit 3).

Finally, respondent believes the matter is ripe to impose a penalty of removal. Nonetheless, it accepts that if this tribunal concludes hearing on the question of penalty is necessary, it will not contest the ruling.

Appellant's cross-motion and opposition argument:

In reply, **appellant, Steven Hotz,** maintains that respondent Garden State's motion should be denied, and his cross-motion for dismissal should be granted. He reasons as follows:

First, the charges were ambiguous and lacking specificity. The appointing authority argues beyond the charge of falsification and into the charge of inmate abuse by labeling the alleged falsification "conduct unbecoming a public employee," this, even though its motion for partial summary decision rests solely on an accusation of falsification.

Second, the charge of falsification was not filed within the forty-five-day parameter imposed by N.J.S.A. 30:4-3.11a, once sufficient information has been obtained to file the matter upon which the complaint is based. Therefore, by the terms of that statutory section, the appointing authority's complaint must be dismissed in its entirety.

Third, the March 11, 2016, interview was constitutionally offensive. He was questioned without counsel of record, and without realizing that, after review, the Burlington County Prosecutor's Office had returned the file to the appointing authority for administrative disposition. This amounts to coercion of his statements. Consequently, these circumstances offend the fifth, sixth and fourteenth amendments of the U.S. Constitution. They also are violative of protocols in the Attorney General's Guidelines.

Fourth, respondent's motion for partial summary disposition lacks supporting affidavits to show that no material facts are in dispute. The deficiency leaves the entire record comprised of hearsay. This tribunal is therefore bereft of a basis on which to judge the weight and competence of the evidence as anticipated in N.J.A.C. 1:1-15.5, in particular where credibility must be assessed.

Fifth, with discovery still in process, this tribunal is without a complete record. Discovery is especially necessary to support appellant's defense of untimely charges being barred by N.J.S.A. 30:4-3.11a.

Sixth, drawing all inferences in favor of appellant, as summary decision requires, substantial factual issues remain to be resolved. There must be testimony as to interpretation of policy. This is needed to establish whether appellant's behavior was inappropriate. Any reliance on inmate hearsay would be without a residuum of competent evidence. There must be a hearing to provide it.

Seventh and eighth, a hearing must be held to establish credibility, thus denying the basis for summary decision. Likewise, there can be no summary decision where the defense is grounded on state of mind, with emphasis on duress, which can only be established through testimony.

Finally appellant insists that no penalty can be levied without a determination of its appropriateness. The totality of his employment record must be explored. Further, there must be a comparison with other penalties administered to the actors involved. This can only be accomplished through trial.

In its second brief, opposing respondent Garden State's earlier opposition to appellant's cross-motion, he states that his own cross-motion must be granted as a matter of law. In his view, this is so for reasons derived from N.J.A.C. 1:1-12.5. Respondent has not raised issues of material fact and has not supported its motion with affidavit. This is a fatal shortcoming, appellant insists.

Analysis and Conclusions of Law:

The controlling rule in any motion for summary decision or partial summary decision is N.J.A.C. 1:1-12.5. For the instant purposes, it is instructive to quote in pertinent part two relevant sub-sections, (b) and (c):

> (b) The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding . . .
>
> . . .
>
> (c) If, on motion under this section, a decision is not rendered on all the substantive issues in the contested case and a hearing is necessary, the judge at the time of ruling on the motion, by examining the papers on file in the case as well as the motion papers, and by interrogating counsel, if necessary, shall, if practicable, ascertain what material facts exist without substantial controversy and shall thereupon enter an order specifying those facts and directing such further proceedings in the contested case as are appropriate. At the hearing in the contested case, the facts so specified shall be deemed established.
> [Emphasis added]
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> . . .

Any comparison of the videos recording the answers by appellant to questions posed by SID investigators on March 11 and May 26, 2016. makes clear beyond cavil that he lied in the first interview. On March 11, 2016, appellant denied any knowledge whatever of the event which occurred during the event in the barbershop on November 6, 2016, and insisted he was not present, and played no part in it. He knew this to be untrue, as his own statements in the second SID interview of May 26, 2016, confirm. At that time, he recanted his testimony in full. Beyond a reasonable dispute, the change can only be seen as contradictory. It was per se a disclosure of falsification on March 11. The deception fits within the charge of violating HRB 84-17, at C. (Personal Conduct) 8 as a clear intention to misstate material facts:

> Falsification: Intentional misstatement of material fact in connection with work, employment, application, attendance, or in any record, report or other proceeding.

Appellant's defenses against this charge relate to state of mind: i.e., influence exerted by SCO Collazo; anxiety over the possibility of dismissal from employment. It is not suggested that appellant did not comprehend the content of his false statements, or that he was compelled by the appointing authority to dissemble. Any other state of mind beyond this perspective may, or may not, have a bearing on penalty, and, as a consequence, testimony may still be elicited to attack penalty on those grounds at plenary hearing. Appellant's own video-recorded statements preclude any doubt, however, that it was his intention to deceive. Credibility is not a concern when only the content of appellant's answers is in issue, as here.

Therefore, consistent with N.J.A.C. 1:1-12.5(d), it is today specified and found to be facts which exists without substantial controversy as follows: Appellant's March 11, 2016, answers claiming that he had no knowledge of, or that he had no presence at, or that he had not participated in, the event involving inmate E.L which occurred November 6, 2015, in the prison barber shop, were false. These findings will be held as established during the upcoming plenary hearing.

The remaining defenses raised by appellant on his cross-motion are addressed below. They do not prevent granting the appointing authority's motion for a partial summary decision holding that appellant committed falsification:

The appointing authority's charges are not ambiguous. The specification of falsification in the amended[1] preliminary notice and the final notice of disciplinary action clearly state that appellant "admitted to providing false information in the initial interview." (Respondent's Exhibits 9 and 10.) This is the charge which he prepared to defend against on Garden State's present motion.

Whether or not the appointing authority's charges were filed within the time-frame of N.J.S.A. 30:4-3.11a is a dispute of fact to be resolved at plenary hearing, toward which discovery is continuing. So too, if found factually, is the dispute of law over whether the delay

[1] Amended Preliminary Notice of Disciplinary Action, dated July 8, 2016.

beyond that time obviates Garden State's case. Nevertheless, this tribunal is not barred from making today's identification of facts not in dispute. N.J.S.A. 1:1-12.5(d). If successful at plenary hearing on the factual and legal aspects of his claim of fatal untimeliness under N.J.S.A. 30:4-3.11a, appellant would not be barred from arguing at that time that today's order must be revisited.

There is no constitutional deficiency present in either the SID interview of March 11, 2016, or the supplemental interview of May 26, 2016. Neither the fifth amendment nor the sixth amendment of the U.S. Constitution, as applied to these facts, have been violated. Appellant submitted to both interviews with full knowledge that they were administrative, not criminal, interviews. (Respondent's Exhibits 3 and 4.) The due process mandate of the fourteenth amendment was likewise satisfied by the appointing authority's adherence to Weingarten[2] requirements. A union representative was present on March 11, 2016, and appellant did not request the presence of his attorney at that time. Appellant signed the customary Weingarten form confirming that the elements of the Court's holdings in the Weingarten case were satisfied. See also, Goldberg v. Kelly, 397 U.S. 254 (1970). These procedures consist of all that is required of the appointing authority when assuring the inherent safeguards of due process in an administrative disciplinary setting. Appellant's reliance on the Attorney General's Guidelines is misplaced. They do not apply to correction officers. In re Cox, Dkt. No. A-2471-14T4 (App. Div. December 7, 2016).

The absence of affidavits from the appointing authority's opposition to appellant's cross-motion is insufficient to grant his cross-motion. The shortcoming is offset by the appointing authority's motion itself, by its accompanying brief with exhibits, as well as by the entirety of the record. Facts must be found which a reasonable observer would see as devoid of substantial controversy and which would be material to a partial summary decision finding that falsification occurred. The record is more than ample for this purpose.

As to the interpretation of policy, over which appellant anticipates need for factual testimony, nothing of record discloses how that would be relevant to whether appellant falsified.

[2] N.L.R.B. v. Weingarten, Inc. 420 U.S. 251 (1975)

On the arguments submitted, it is difficult to understand why the dispositive written policy, HRB 84-17 C. (Personal Conduct) 8 should not be presumed to speak for itself. This is inescapably true where a severe disciplinary penalty hangs in the balance. The reading of the section must be narrow. It must be limited to the plain intent of the regulating words. Any ostensible breach thereof would not be a call for an interpretive, subjective search for meaning. Explanation by witnesses cannot stand between the clear expression of the determinative HRB 84-17 section, nor may witnesses filter the direct application of this section by the administrative law judge to the facts found.

Finally, testimony and argument to establish penalty, if any, to be imposed after de novo consideration here, must abide the full trial of the remaining charges and related factual issues. West New York v. Bock, 38 N.J. 500 (1962). Penalty cannot fairly be decided today.

ORDER

I ORDER, therefore, as follows:

1. Respondent's charge of falsification is affirmed, and appellant's continued factual or legal defense against that charge at hearing is foreclosed.
2. The penalty for the offense of falsification will be decided after opportunity during plenary hearing for both sides to provide argument addressing appropriate discipline.
3. Plenary hearing on the remaining portions of respondent's charges will now proceed.
4. Appellant during plenary hearing may pursue factual and legal argument in support of his affirmative defense grounded on N.J.S.A. 30:4-3.11a, to which respondent may reply similarly.

This order may be reviewed by the **CIVL SERVICE COMMISSION**, either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

March 24, 2017
DATE

JOSEPH LAVERY, ALJ t/a

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