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STATE OF NEW JERSEY

In the Matter of John Baker
Ann Klein Forensic Psychiatric
Hospital, Department of Human
Services

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**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

CSC DKT. NO. 2012-3655
OAL DKT. NO. CSV 09967-12

ISSUED: MARCH 23, 2017 BW

The appeal of John Baker, Senior Security Officer, Ann Klein Forensic Psychiatric Hospital, Department of Human Services, removal effective June 14, 2012, on charges, was heard by Administrative Law Judge Elia A. Pelios, who rendered his initial decision on February 10, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on March 22, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

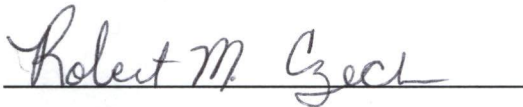
ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of John Baker.

Re: John Baker

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
MARCH 22, 2017

A handwritten signature in cursive script, reading "Robert M. Czech", is written over a horizontal line.

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 09967-12

AGENCY DKT. NO. 2012-3655

**IN THE MATTER OF JOHN BAKER,
ANN KLEIN FORENSIC PSYCHIATRIC
HOSPITAL, DEPARTMENT OF
HUMAN SERVICES.**

Stuart J. Alterman, Esq., for appellant (Alterman & Associates, LLC, attorneys)

Adam Verone, Deputy Attorney General, for respondent (Christopher S. Porrino,
Attorney General of New Jersey, attorney)

Record Closed: September 28, 2015

Decided: February 10, 2017

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

Respondent Ann Klein Forensic Psychiatric Hospital, Department of Human Services (Ann Klein) removed senior medical security officer (SMSC), John Baker, for N.J.A.C. 4A:2-2.3(a) 7 Neglect of duty; A.O. 4:08 B2 Neglect of duty, loafing or idleness or willful failure to devote attention of tasks which could result in danger to persons or property; A.O. 4:08 B3 2 Sleeping while on duty; A.O. 4:07E1 Violation of a rule, regulation,

policy, procedure or Administrative decision; and A.O. 4:07 C8 Falsification: Intentional misstatement of fact in connection with work in any record or report. The matter arises from appellant allegedly sleeping on duty, and failing to make his required counts and census of the patient population.

PROCEDURAL HISTORY

On May 24, 2012, respondent served on appellant a preliminary notice of disciplinary action removing him. Appellant did not request a departmental hearing. Respondent Ann Klein issued a Final Notice of Disciplinary Action on June 13, 2012, removing appellant effective April 28, 2012. Appellant filed an appeal with the Civil Service Commission on or about July 25, 2012. The Office of Administrative Law (OAL) filed the matter as a contested case on July 25, 2012, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was heard on August 21, 2013, and September 17, 2014. The record was held open for submission of closing briefs, and the record closed on September 28, 2015. Orders were entered in this matter to allow for the extension of time in which to file the initial decision.

FACTUAL DISCUSSION

Ron McMullen (McMullen) testified on behalf of the appellant. He has been employed at Ann Klein for eighteen years, is a senior medical security officer, and is also the union president. He described the role that he plays in disciplinary proceedings as trying to keep employees employed, or to reduce their disciplines. He is familiar with sleeping cases, but cannot remember how many he has been involved with. McMullen is familiar with a number of cases, but is not aware of similar employees being removed from Ann Klein regarding intentional misstatement or for violation of a rule. He was involved in negotiating the penalty for appellant in the present matter. Appellant has never received a major discipline. One major discipline appellant was charged with was reduced to a five-day suspension that he did not serve. Baker has no prior charge for falsification of documents; one prior discipline for sleeping on the job; and one prior discipline for neglect of duty. McMullen has observed officers fail to make their checks, and has been aware of it as union rep as well.

Sandy Hereford (Hereford) testified on behalf of the respondent. Hereford has worked at Ann Klein since November 4, 1989, and was serving as a security supervisor on the third shift, with hours between 10:30 p.m. to 6:30 a.m. The position involved ensuring the well-being of patients and staff. Hereford was working on April 12 through 13, 2012, and knows the appellant who was also employed at Ann Klein. Hereford and the appellant had no problems outside of work.

On April 12, 2012, Hereford was on duty in base two. A call was received from another supervisor, Thomas Savage, requesting Hereford's presence in unit four. When Hereford arrived the unit nurse was present, and asked Hereford to look at the unit. Hereford observed the appellant sitting in front of the television, with no other people around him. Security supervisor Savage then asked the supervising nurse to also describe what she observed. Hereford went to check on patients at about 4:20 a.m. Hereford began with room one, and by the time she got to room five, the appellant jumped-up, but stayed where he was while Hereford continued to check the rooms. Hereford picked-up the census and the periodic patient observation (PPO) sheets, performed a check of all twenty-five rooms, and noted appellant had been one and one-half hours behind on inspection logs.

Hereford reviewed the policy about counts, (R-2) including a description of what was required of the patient room check. It is important that the policy be followed because patients are vulnerable. Beginning at 10:30 p.m., a patient-check is to be performed every half-hour by walking around, checking-in, and signing-off on the names. Signing-off ahead of time defeats the purpose of the check, and the form should never be signed-off if the check was not actually performed.

Hereford noted that the 4:30 a.m. check was initialed, but not signed. The backs of the documents were signed by nursing at 4:20 a.m. and 4:25 a.m. Hereford also reviewed documents which memorialize the PPO check. This requires that you get-up, go to the door, and look-in on the patients. PVL stands for periodic visual observation, and one of the memorializing documents requires face-to-face observation.

Hereford also reviewed document R-5. These were notations for patient W.M., who required fifteen minute observations as a precaution for self-harm and assault. From 12:45 a.m. to 3:00 a.m., all indications were that the patient was resting. Although there should have been, no checks were performed between 3:00 a.m. and 4:15 a.m. The unit nurse signed off at 4:20 a.m., and the supervisor of nursing signed off at 4:25 a.m. Hereford also reviewed document (R-6), which was her statement, which she believes is accurate and consistent.

The video of the incident was then shown in the hearing room. Hereford identified Baker in the video, as he was the only officer inside working on the third shift. The video shows Baker sitting in a chair, and there was considerable movement and conversation. Between 12:46 a.m. and 1:08 a.m., Baker had not moved from the chair, and is observed switching channels on the television. At 1:55:29 a.m. Baker gets up from the chair, walks around for about forty seconds, and later appears to be surveying the area before sitting again. At 2:08 a.m., Baker gets up, sits down again at 2:09 a.m., without performing a check. At 2:11 a.m., he performs a check, and sits down at 2:19 a.m. At approximately 2:58 a.m., the unit nurse comes through. At 3:19 a.m. no check has been performed, and Baker appears to be reclined in his chair. At 4:17 a.m., supervisor Savage is seen entering the control room, and at 4:18:58 brings in the unit nurse. At 4:20 a.m. Hereford enters the control unit, Baker does not react to these three individuals staring at him. At 4:25 a.m. Baker stands-up, takes the sheets, stands by the television. At 4:33 a.m. Baker goes to the bathroom, returns and sits down again at 4:34 a.m. He does not perform a check. At 5:35:50 a.m. Baker gets-up and performs a check. At 5:48:21 a.m. he sits back-down. At 6:21 a.m. there is a shift-change, Baker puts the chair back where it belonged, and performed no further checks. At 6:25:18 a.m. the video concluded.

On cross-examination, Hereford noted that there are twelve medical supervisors at Ann Klein, and three are usually on the third-shift. It is noted that the center officer can see the inside officer. Nothing was reported to Hereford about Baker. Hereford did not see the supervisor perform a check, and noted that the nurse sign-off was on a PPO sheet, not a census sheet. Hereford's statement was written on April 18, 2012, five days after the incident. Hereford did not want to be involved, and did not want to be accused of harassing Baker. Hereford described it as frustrating when you need to keep redirecting someone

about their regular job duties. Hereford did not actually see Baker with his legs up, and could not see his face, therefore, could not see that Baker's eyes were closed. It is noted that a buzzer sounds when the door opens. Baker did not say anything when Hereford asked for his sheets. Hereford noted that Baker never listens to redirections.

Thomas Savage (Savage), security supervisor for Ann Klein, also testified on behalf of the respondent. He knows Baker, and remarked that they started at the same time. He was a supervisor for about five years at the time of the incident in question. He had no problem with Baker outside of the work area, and had no personal issues with him. He believes that a supervisor is negligent if not adequately supervising the officers under them. Savage states that he had spoken with Baker on a few occasions about being more attentive. He notes that the third-shift sometimes has a lax attitude, and generally was reserved for the older officers. Savage observed Baker in the chair, and noted that he appeared to be asleep. Baker was not aware of Savage's presence or any nurse who came in after. Savage called a fellow supervisor and a supervising nurse down to observe, as past practice in these instances was to get a second set of eyes. He identified his statement in the matter document (R-7), and asserted that it is accurate.

On cross-examination, Savage explained that four- to six-checks are performed per shift. The checks involve going to the unit to make sure that everyone is attentive. It is not required for Savage to physically observe patients during his shift. Earlier in the day of the incident, he had knocked on the glass, and described it as knocking three times in rapid succession. He could see Baker in the front and right side, sitting in the chair, though Savage does not recall if Baker's feet were up. He did observe that his eyes were closed. He has never seen the video of this incident, and testified based on his report as recollection. Savage was never asked to provide a report; he wrote the statement on his own.

Savage noted that the third-shift is fairly quiet and cold. Officers often wear jackets and hats, they are not permitted to bring blankets with them. A collar being up is not appropriate, but is not an issue. Having the jacket over one's head, however is not acceptable. Savage advised that he has never had to go to the lengths with other officers which he has had to with Baker.

Rosita Kane (Kane), a registered nurse who works at Ann Klein, also testified on behalf of the respondent. She was working the overnight shift on April 12 through 13, 2012. She knows Baker from work, and has no problems with him outside of work. Kane described that Savage asked her to come out of the nursing room and to come to the center. He asked her what she saw, and she responded that she saw Baker sitting in the chair as her signature indicated on Exhibits R-3 and R-5. On cross-examination, she noted that she performed her own check earlier. Kane was doing paperwork when Savage contacted her. All she saw was Baker sitting in the chair, she could not see if his head was up, and she does not remember what side she saw. She could not see Baker's face. Kane went back to her station, and does not know how long it was before she signed the paperwork. She signed the documents because Savage asked her to.

Sharon Herring (Herring) also testified on behalf of the respondent. She's worked at Ann Klein for twenty-five years, and was the third-shift nursing supervisor. She knows the appellant, and has worked with him on the third-shift. Herring was working on the date in question, on the third-shift. She recalled that she was called into unit four by Savage to witness Baker, who was not attentive. In her words, he appeared to be sleeping. Savage wanted witnesses, and she recalls that they were talking loudly while they were in the unit, and Baker did not even acknowledge their presence. Herring referred to the census sheet for that date, and signed at 4:25 a.m., because it had not been updated. Baker did sign from 2:36 a.m. to 4:20 a.m. She signed document (R-5), because it was not updated. A self-harming patient needs to be observed for fear of suicide, self-mutilation, and such a patient is more likely to harm himself overnight. No check was performed since 3:00 a.m., and she signed the document at 4:25 a.m.

Herring reviewed the video of the April 19, 2012 incident, and identified Baker in the lower right-hand corner. By 2:00 a.m., Herring had not seen any checks by Baker. At 2:05 a.m. she entered the control center, and saw Baker sitting in the chair with a coat over his head. She could not see his face. Herring asked the center officer to knock on the window to get Baker to bring the census check form for her to sign. As of 3:30 a.m., there still was not any census check performed. The same was true at 4:30 a.m. At 6:03 a.m. there is a

shift change, and by 6:30 a.m., there still were not any checks performed at the end of Baker's shift.

FINDINGS OF FACT

The appointing authority presented video evidence and testimony by witnesses which was credible and consistent. Appellant's only testimonial evidence did not contradict the eyewitness versions of the events, but largely spoke to the appropriateness of penalty. Considering the forgoing, I **FIND** that on April 12 and 13, 2012, and again on April 19, 2012, appellant slept while on-duty and in so doing failed to perform the majority of his required checks and counts of the patient census. I further **FIND** that appellant submitted paperwork indicating he had performed checks which he had not.

CONCLUSIONS OF LAW

In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). The authority must show by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

In the present matter, respondent has charged appellant with violating N.J.A.C. 4A:2-2.3(a)7 (neglect of duty); and violations of Administrative Orders 4:08 B2 (neglect of duty), B3 (Sleeping While on Duty), E1 (Violation of a Rule . . .) and C8 (Falsification).

"Neglect of duty" has been interpreted to mean that "an employee . . . neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009) (citation omitted), adopted, Civil Service Commission (March 27, 2009), <<http://njlaw.rutgers.edu/collections/oal/>>. The term

“neglect” means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). “Duty” means conformance to “the legal standard of reasonable conduct in the light of the apparent risk.” Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job.

In the present matter, the record reflects that appellant did not perform the majority of his required census checks on April 12 and 13, 2012, and April 19, 2012. I **CONCLUDE** that his failure to do so constituted omissions of required duties, and therefore, I **CONCLUDE** that the appointing authority has proven, by a preponderance of credible evidence, that the charges of violating N.J.A.C. 4A:2-2.3(a)7 (neglect of duty), and Administrative Order 4:08 B2 (Neglect of Duty) should be and are hereby **SUSTAINED**.

Appellant was also charged with a violation of AO 4:08 B3, Sleeping while on duty. The record reflects that on both dates in question appellant was observed sleeping while he was on duty and while expected to be performing his census checks. Accordingly, I **CONCLUDE** that the appointing authority has proven, by a preponderance of credible evidence, that the charge of violating Administrative Order 4:08 B3 should be and is hereby **SUSTAINED**.

Appellant was also charged with a violation of AO 4:08 C8, Falsification: Intentional misstatement of material fact in connection with work, employment, application attendance or in any record, report, investigation or other proceeding. The record reflects that on both dates in question appellant completed forms indicating he had performed census checks of patients when in fact he had not. Accordingly, I **CONCLUDE** that the appointing authority has proven, by a preponderance of credible evidence, that the charge of violating Administrative Order 4:08 C8 should be and is hereby **SUSTAINED**.

Appellant was also charged with a violation of AO 4:08 E1, Violation of a rule, regulation, policy, procedure order or administrative decision. The record reflects that on both dates in question appellant failed to make required checks and counts as specifically

required by Policy and Procedure 603 (R-2). Accordingly, I **CONCLUDE** that the appointing authority has proven, by a preponderance of credible evidence, that the charge of violating Administrative Order 4:08 E1 should be and is hereby **SUSTAINED**.

PENALTY

N.J.S.A. 11A:2-19 and N.J.A.C. 4A:2-2.9(d) specifically grant the Commission authority to increase or decrease the penalty imposed by the appointing authority. Typically, the Board considers numerous factors, including the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463.

"Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, 38 N.J. 500, 523 (1962), that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990).

Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

In re Carter, 191 N.J. 474, 484 (2007), citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197-98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense); see also, In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year old's face was terminated, despite lack of any prior discipline):

. . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.

Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

N.J.S.A. 11A:2-19 provides that the Civil Service Commission may increase or decrease the penalty imposed by the appointing authority, but removal shall not be substituted for a lesser penalty. See, Sabia v. City of Elizabeth, 132 N.J. Super. 6, 15-16 (App. Div. 1974), certif. denied, Elizabeth v. Sabia, 67 N.J. 97 (1975).

The record reflects that the appellant's position involves the care and protection of members of one of this State's most vulnerable populations, and that the nature of his misconduct causes a risk of harm to this population. The patients and their families are entitled to expect that care, observation, and required checks on the patients' well-being, will be conducted in accordance with governing procedures, and appellant failed repeatedly to do so, and completed paperwork which purported that he had. Clearly this constitutes an act of severe misconduct, and a breach of trust required of his position, one which he has performed several times prior, and continues to repeat.

A copy of the Department of Human Services Disciplinary Action Program (R-9) was placed into evidence, and indicates recommended penalties for various violations. Although not binding on this tribunal, this document offers a reasonable basis for imposition of penalty which may be considered. For each of the Administrative Orders violated by appellant, a maximum penalty of removal is indicated for even a first offense. Considering the volume of infractions over multiple occasions, and in consideration of the foregoing, along with appellant's disciplinary records (R-10, R-11), I **CONCLUDE** that the respondent's action in removing the appellant was justified.

ORDER

I **ORDER** that the charge of N.J.A.C. 4A:2-2.3(a) 7 Neglect of duty; A.O. 4:08 B2 Neglect of duty, loafing or idleness or willful failure to devote attention of tasks which could result in danger to persons or property; A.O. 4:08 B3 2 Sleeping while on duty; A.O.

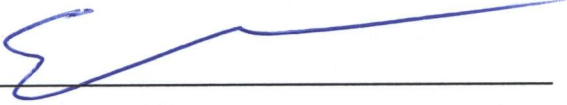
4:07E1 Violation of a rule, regulation, policy, procedure or Administrative decision; and A.O. 4:07 C8 Falsification: Intentional misstatement of fact in connection with work in any record or report, be **SUSTAINED**. I further **ORDER** that respondent's removal of employee also be **SUSTAINED**.

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.

February 10, 2017
DATE


ELIA A. PELIOS, ALJ

Date Received at Agency:

February 13, 2017

Date Mailed to Parties:

February 13, 2017

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APPENDIX

WITNESSES

For Appellant:

Ron McMullen

For Respondent:

Sandy Hereford
Thomas Savage
Rosita Kane
Sharon Herring

EXHIBITS

For Appellant:

- A-1 State of NJ, Department of Human Services, Ann Klein Forensic Center-
Employee Form, Rating Cycle March 1, 2011 to February 29, 2012
- A-2 State of NJ, Department of Human Services, Ann Klein Forensic Center-
Employee Form, Rating Cycle March 1, 2010 to February 28, 2011
- A-3 State of NJ, Human Resources System, Discipline Reason/Infraction Listing
By Reason Code, Between January 1, 2000 and May 13, 2013
- A-4 State of NJ, Human Resources System, Discipline Reason/Infraction Listing
By Reason Code, Between January 1, 2000 and May 13, 2013
- A-5 State of NJ, Human Resources System, Discipline Reason/Infraction Listing
By Reason Code, Between January 1, 2000 and May 13, 2013
- A-6 State of NJ, Human Resources System, Discipline Reason/Infraction Listing
By Reason Code, Between January 1, 2000 and May 12, 2013

For Respondent:

- R-1 Preliminary and Final Notices of Disciplinary Action
- R-2 Ann Klein Forensic Center Policy and Procedure - Counts
- R-3 Ann Klein Forensic Center Officer Assignment

- R-4 Ann Klein Forensic Center Policy and Procedure – Levels of Observation/
Precautions
- R-5 Ann Klein Forensic Center Interview and Observation Data Sheet
- R-6 Supervisor Hereford Memo – Neglect of Duty/Sleeping on Duty
- R-7 Thomas Savage Memo to Mr. Staub, dated April 13, 2012
- R-8 Sharon Herring Memo to Chuck Moore, date May 13, 2012
- R-9 State of NJ, Department of Human Services, Disciplinary Action Program
- R-10 State of NJ, Human Resources System, Employee Disciplinary History
- R-11 State of NJ, Department of Human Services, Notice of Suspension from Duty
Without Pay
- R-12 Ann Klein Forensic Center Shift Assignment
- R-13 Security Video, dated April 12 to 13, 2012
- R-14 Security Video, dated April 19 to 20, 2012