B-25

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Donju Frazier,
Department of Corrections

CSC Docket No. 2017-1809

Request for a Stay

ISSUED: JUL 27 2017

The Department of Corrections, represented by Christopher Weber, Deputy Attorney General, petitions the Civil Service Commission (Commission) for a stay of the attached initial decision of the Administrative Law Judge (ALJ), which modified Donju Frazier's removal to a 120 working day suspension and was deemed adopted as a final decision on October 11, 2016, pending the outcome of its appeal to the Superior Court, Appellate Division.

As background, Frazier was removed from employment effective March 29, 2016, on charges of conduct unbecoming a public employee, other sufficient cause and violations of departmental policies and procedures. The appointing authority asserted that Frazier failed to report his involvement with law enforcement while serving an overseas tour as a soldier in the United States Army National Guard; that Frazier was untruthful during the appointing authority's investigation; and that the underlying conduct for which Frazier was charged constituted conduct unbecoming a public employee. Upon his appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing. The ALJ issued her decision, which modified Frazier's removal to a 120 working day suspension. Specifically, the ALJ upheld only the charge of conduct unbecoming a public employee, finding that Frazier was intoxicated and acted inappropriately at a party. The ALJ also found that there was flirting and unwanted touching on Frazier's part at the party, and he was a superior officer. However, the Commission did not have a quorum at the time of the ALJ's initial decision, and Frazier did not consent to an additional extension of time for the Commission to render its decision. As such, the ALJ's decision was deemed adopted as the final decision pursuant to *N.J.S.A.* 40A:14-204. On October

11, 2016, the parties were advised, among other things, that Frazier was to be reinstated. Thereafter, the appointing authority filed an appeal with the Appellate Division.

In the instant matter, the appointing authority argues that the ALJ's factual findings and credibility determinations were not supported by the evidence in the record and that her legal conclusions were also erroneous. Specifically, the appointing authority contends that the ALJ erroneously concluded that the charges filed against Frazier under the Uniform Code of Military Justice (UCMJ) were not criminal in nature, that Frazier's request for a "Chapter 10 Discharge in Lieu of Trial by Court-Martial" was not an admission of criminal behavior, and that Frazier's discharge was merely for drunk and disorderly conduct. In this regard, it argues that the ALJ should have viewed the court-martial procedure as criminal in nature. It also argues that in order to be discharged following a Chapter 10 request, Frazier could not have only been admitting to drunkenness or disorderly conduct because those charges could not have resulted in a court-martial. Thus, Frazier must have been admitting that he was guilty of either sexual assault, assault or maltreatment. Had Frazier engaged in such conduct as a civilian, he would have been subject to prosecution and conviction under the New Jersey Code of Criminal Justice. The appointing authority maintains that the charging document regarding the UCMJ charges is tantamount to a summons and/or arrest. Further, the appointing authority contends that the ALJ failed to apply the enhanced standard of conduct for law enforcement officers, particularly as it pertains to Frazier's lack of candor in the appointing authority's investigation and inconsistencies in his testimony at the OAL hearing, offered no reason as to why the victim of the incident, Lashay Johnson, was not a credible witness, and failed to consider a prior memorandum of reprimand issued by the military when modifying the penalty. As such, it asserts that removal is appropriate.

Additionally, the appointing authority argues that Frazier's reinstatement will present the risk of immediate and irreparable harm and the public interest weighs in favor of a stay. Specifically, it argues that by his admission to the offenses and conduct enumerated in the military charges, Frazier has demonstrated a lack of self-control and the inability to behave appropriately and professionally in a military or paramilitary setting. It states that he sexually assaulted a subordinate female soldier and claims that his reinstatement will pose a significant risk to subordinate or less-senior officers and the inmates he would be responsible for supervising. The appointing authority asserts that this is clearly not a harm that can be remunerated by monetary damages, and the danger of recurrence cannot be overlooked given the sexual nature of Frazier's transgressions. Moreover, the public has an interest in keeping individuals with a history of criminally sexual behavior out of law enforcement, and the appointing authority has an obligation to protect the safety of its employees and inmates.

Furthermore, the appointing authority argues that there is an absence of substantial injury to other parties if its request is granted. Specifically, it argues that the harm to Frazier would be minimal. The only harm he may suffer would be the loss of income, which will be remedied if he prevails on appeal.

In response, Frazier, represented by Colin M. Lynch, Esq., argues that the appointing authority has not met the standard for a stay. Specifically, he notes that appellate review of agency decisions is deferential. He maintains that the ALJ's findings and conclusions were correct. Frazier also notes that the appointing authority has not submitted the OAL hearing transcript.

Additionally, Frazier argues that the appointing authority will not suffer irreparable harm in the absence of a stay as its factual allegations that he sexually assaulted a female officer and will constitute a risk to other officers are not supported by the record. Frazier cites the Commission's denials of stays in *In the Matter of Nicholas Manla* (CSC, decided October 17, 2012) and *In the Matter of Isaiah Knowlden* (CSC, decided October 17, 2012) in support. In *Manla*, a Human Services Assistant with North Jersey Developmental Center was brought up on disciplinary charges for, in part, pushing and kicking a client. In *Knowlden*, a Human Services Assistant with Trenton Psychiatric Hospital was brought up on disciplinary charges for, in part, punching a patient in the mouth. Both employees were reinstated with suspensions in lieu of removal, and the Department of Human Services (DHS) sought stays of the Commission's decisions pending appeal to the Appellate Division. DHS argued that irreparable harm would be suffered without a stay as the employees represented threats to the citizens of the centers and there was a great danger that they would physically assault the clients again. The Commission rejected these arguments, noting that any argument that these isolated incidents foreshadowed similar future conduct was mere speculation. The employees were disciplined for the incidents at issue, and mitigating factors were considered in reducing the penalties. Frazier contends that the same speculative arguments by the appointing authority here, that his conduct forecasts future like incidents, should also be rejected as mere conjecture without a basis in fact. Frazier also asserts that there is no possibility that he could constitute a risk or threat to anyone since he has not been physically returned to work, though the appointing authority is paying him.

Further, Frazier argues that a stay will cause him substantial injury given the various ills that befall upon an individual who is denied his primary source of income for an extended period of time. In addition, Frazier maintains that a stay is not in the public interest. Specifically, the public interest is not served when a Commission order is not implemented in a timely fashion. *Manla, supra; Knowlden, supra.* He notes that in *Manla* and *Knowlden*, DHS cited its obligation to safeguard clients as the public policy that supported stays. The Commission rejected this argument and instead noted that the taxpayers may owe the

employees more back pay if the stays were granted and the employees ultimately succeeded before the Appellate Division. Frazier asserts that the appointing authority makes the same argument here, and likewise this same argument should be rejected. In support, Frazier submits portions of the OAL hearing transcript.

In reply, the appointing authority reiterates that it will suffer immediate and irreparable harm in the absence of a stay. Specifically, it contends that an individual prone to drunkenness and unwanted sexual contact and harassment with a subordinate officer in a military setting cannot be permitted to reenter a paramilitary organization tasked with overseeing a prison population. The appointing authority argues that *Manla, supra* and *Knowlden, supra* are distinguishable. In this regard, Frazier's conduct was not an isolated, reactionary instance of physical contact in the heat of the moment, as it was in those cases. Rather, his conduct involved the drunken sexual abuse of a subordinate female officer with whom he served in a military context, substance abuse, sexual abuse, and the abuse and exploitation of power. Such behavior is predictive of a significant risk of harm to the prison population and coworkers. In addition, while the appointing authority acknowledges that it has not yet scheduled Frazier for active duty, it argues that this does not render the issue moot as an order returning Frazier to work is still in effect. In support, the appointing authority submits, among other things, the full OAL hearing transcript.

## CONCLUSION

*N.J.A.C.* 4A:2-1.2(c) provides the following factors for consideration in evaluating petitions for interim relief:

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm;
3. Absence of substantial injury to other parties; and
4. The public interest.

Also, *N.J.A.C.* 4A:2-1.2(f) allows a party, after receiving a final administrative decision by the Commission and upon filing an appeal to the Appellate Division, to petition the Commission for a stay pending the decision of the Appellate Division. *See also, N.J. Court Rules* 2:9-7.

The appointing authority presents detailed arguments in the instant request for a stay as to why the ALJ's decision was erroneous. It is noted that her decision has been deemed adopted as the final decision and the appointing authority has filed an appeal with the Appellate Division. It is well settled that, normally, an appellate court will reverse the final decision of an administrative agency only if it is arbitrary, capricious or unreasonable or if it is not supported by substantial credible evidence in the record as a whole, or if it violates legislative policy

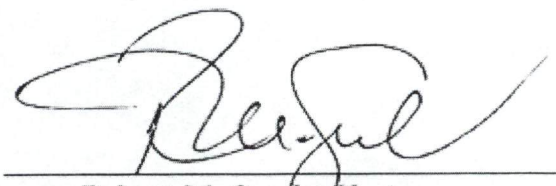
expressed or fairly to be implied in the statutory scheme administered by the agency. *See Karins v. City of Atlantic City,* 152 *N.J.* 532, 540 (1998); *Henry v. Rahway State Prison*, 81 *N.J.* 571, 579-80 (1980); *Mayflower Securities v. Bureau of Securities*, 64 *N.J.* 85, 92-93 (1973); *Campbell v. Civil Service Department*, 39 *N.J.* 556, 562 (1963). However, in *In the Matter of William R. Hendrickson, Jr.*, Docket No. A-3675-15T1 (App. Div. July 19, 2017), the court determined that an ALJ's deemed-adopted decision should not be reviewed deferentially and that it would instead apply the standard of review for bench trials. Specifically, the court stated that an ALJ's factual findings will be affirmed to the extent that they are supported by substantial credible evidence in the record, but no deference would be accorded to the ALJ's legal conclusions. The court noted that such legal conclusions would be reviewed *de novo*. Under the standard of review announced in *Hendrickson*, there does appear to be a clear likelihood of success on the merits of the appointing authority's appeal before the Superior Court, Appellate Division. Further, Frazier's demonstrated lack of self-control in a military setting demonstrates that he would pose a significant risk to subordinates and to less-senior officers and the inmates he would be responsible for supervising. Moreover, there is no substantial injury to other parties in granting the stay as the only harm he may suffer is loss of income, which will be remedied if he prevails in his appeal. Finally, it is in the public interest in keeping individuals who demonstrate a lack of self-control out of law enforcement given the appointing authority's obligation to protect the safety of its employees and inmates. Accordingly, there is a basis for a stay of the final decision.

**ORDER**

Therefore, it is ordered that this request for a stay be granted.

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 26TH DAY OF JULY, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Written Record Appeals Unit
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

c. Elizabeth Whitlock
Christopher Weber, DAG
Donju Frazier
Colin M. Lynch, Esq.
Todd Wigder, DAG
Clerk, Superior Court, Appellate Division
Kelly Glenn
Records Center

CHRIS CHRISTIE
*Governor*
Kim Guadagno
*Lt. Governor*

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

ROBERT M. CZECH
*Chair/Chief Executive Officer*

October 11, 2016

Colin M. Lynch, Esq.
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
One Riverfront Plaza, Suite 320
Newark, New Jersey 07102-5410

Paul D. Nieves, DAG
Department of Law & Public Safety
P.O. Box 112
Trenton, New Jersey 08625-0112

Re: *Donju Frazier v. New Jersey State Prison, Department of Corrections* (CSC Docket No. 2016-3665 and OAL Docket No. CSR 6346-16

Dear Mr. Lynch and DAG Nieves:

The appeal of Donju Frazier, a Senior Correction Officer at New Jersey State Prison, Department of Corrections, of his removal, on charges, was before Administrative Law Judge Sarah G. Crowley (ALJ), who rendered her initial decision on August 12, 2016 modifying the removal to a 120 working day suspension. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

The time frame for the Commission to make its final decision was to initially expire on September 26, 2016. *See N.J.S.A.* 40A:14-204 and *N.J.A.C.* 1:4B-1.1(d). Prior to that date the Commission secured a 15-day extension of time to render its final decision no later than October 11, 2016. *See N.J.A.C.* 1:1-18.8. Since the Commission does not currently have a quorum, it sought consent from the parties, as required, to secure a second 15-day extension. However, the appellant did not provide consent for an additional extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A.* 40A:14-204.

Since the appellant's removal has been modified, he is entitled to back pay, benefits and seniority for the period 120 working days from the onset of his separation until he is actually reinstated. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. However, pursuant to *N.J.A.C.* 4A:2-2.12, as charges have been upheld and major discipline imposed, the appellant is not entitled to counsel fees. Proof of income earned should be submitted to the appointing authority within 30 days of said reinstatement. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the

A1

amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

Sincerely,

Nicholas F. Angiulo
Assistant Director

Attachment

c: The Honorable Sarah G. Crowley, ALJ (w/out attachment)
Kelly Glenn
Records Center

*State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. CSR 06346-16
AGENCY DKT. NO. N/A

**IN THE MATTER OF DONJU FRAZIER,**
**NEW JERSEY STATE PRISON,**
**DEPARTMENT OF CORRECTIONS.**

---

**Colin M. Lynch**, Esq., for appellant (Zazzali, Fagella, Nowark, Kleinbaum and Friedman, attorneys)

**Paul Nieves**, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: August 10, 2016 Decided: August 12, 2016

BEFORE **SARAH G. CROWLEY**, ALJ:

## STATEMENT OF THE CASE

Donju Frazier (appellant) was employed by the New Jersey Department of Corrections (NJDOC) as a Senior Corrections Officer. He was hired in 2007. He was also a soldier in the United States Army National Guard and served several tours during his tenure at NJDOC. Respondent seeks to remove appellant from his position as a result of his alleged involvement with "law enforcement," while overseas, which he failed

to report. The respondent also alleges that appellant was untruthful during the investigation and finally, that the underlying conduct for which he was charged constitutes conduct unbecoming.

## PROCEDURAL HISTORY

On January 4, 2016, a Preliminary Notice of Disciplinary Action was served on the appellant. A departmental hearing was held on February 11, 2016, and a Final Notice of Disciplinary Action sustaining the removal was served on the appellant on March 29, 2016. The appellant requested a hearing and the matter was transferred to the Office of Administrative Law (OAL), on April 19, 2016, to be heard as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on July 15, 2016, July 28, 2016, and August 1, 2016. The parties submitted post hearing submissions on August 10, 2016, and the record closed on that date.

## SUMMARY OF CASE

On December 9, 2014, appellant attended a beach party in Qatar along with the other members of his platoon. There were over 200 soldiers in attendance at the party. An incident occurred between appellant and Sergeant First Class (SFC) Lashay Johnson which led to charges being brought against him. After military charges were brought, appellant requested a Chapter 10 Discharge in Lieu of Trial by Court-Martial. The request was made in October 2015, and was granted on November 2, 2015. He was removed from the Army, and reduced to a Private. Appellant forwarded the DD-214[1] regarding his discharge to the NJDOC on November 16, 2015. He had not advised the NJDOC of anything prior to this notice. The initial DD-214 regarding appellant's discharge did not indicate that appellant's discharge was Other Than Honorable (OTH). The initial allegation that appellant had falsified this document has been withdrawn, as the Army acknowledged that it was their clerical error. However, the respondent now alleges that appellant knew, or should have known that his

[1] DD-214 is the official notification of a discharge of a discharge from the U.S. Military.

discharge was OTH and should have advised NJDOC of same. The army forwarded an amended DD-214, which indicated the discharge was OTH, and acknowledged that it was their clerical error.

When appellant returned to work on November 16, 2016, he was interviewed by the Special Investigation Unit (SIU) regarding the incident which led to his discharge from the military. As a result of the SIU investigation, the appellant was charged with conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)6) General Causes; HRB 84-17 (as amended) C(8) Falsification, intentional misstatement of material fact in connection with work, employment application, attendance , or in any record, report, investigation or other proceeding; C11) Conduct unbecoming an employee; E(1) Violation of rule, regulation, policy, procedure, order or administrative decision. The respondent seeks appellant's removal for these violations. [2]

## TESTIMONY

**For respondent:**

**Matthew Schlusselfeld** is a Special Investigator for SID at NJDOC. He has been employed by the NJDOC for eight years and has been an investigator for one year. He was assigned to do an investigation into the matter involving appellant on November 16, 2015. Appellant submitted military orders regarding his discharge from the military to the NJDOC on November 16, 2015. His status as active or on leave determined the rate of pay he received from the NJDOC. The Human Relations (HR) department had received a memorandum regarding appellant's Request for Discharge in lieu of Trial by Court-Martial. They were advised that appellant was discharged under a Chapter 10, with an OTH characterization. He reached out to the Criminal Investigation Department (CID) in the US Army to inquire regarding the incident.

[2] In addition to the incident in 2014, the respondent initially alleged that there was an investigation in 2012, which involved the appellant. There were no charges brought and no testimony or evidence regarding this incident. The DAG acknowledged that there are no current charges pertaining to this incident and no reference to same in the Preliminary or Final Notice of Disciplinary Action.

Schlusselfeld was advised that appellant had been charged with unlawfully touching a female soldier, sexual contact, as well as drunkenness and disorderly conduct. The allegations related to an incident at a beach party in Qatar on December 9, 2014. Appellant had allegedly touched a female soldier without her consent. He received information regarding the CID investigation as well as the discharge papers. He testified that the original order which indicated that it was an honorable discharge was voided and a subsequent order was provided which accepted the Chapter 10 request but indicated that it was and OTH discharge. It is not disputed that the military made the error and the appellant had not falsified the document.

On November 16, 2015, Schlusselfeld conducted a video interview with appellant. Appellant was provided with his Weingarten rights and his union representative was present. The video was provided and viewed by the undersigned. They asked appellant if he had any unusual events to report while he was off duty. Schlusselfeld did not indicate the time frame he was referring to and did not provide him with any of the military document for which his questions related. The Weingarten rights indicated that they related to a "failure to report an arrest." Appellant initially stated that he had no unusual events to report. However, when asked if he had any encounters to law enforcement from the US Army Criminal Investigation Division in December 2014, appellant stated yes, and explained what happened. Appellant denied that he was guilty of the charges and claimed the charges were administratively discharged.

Appellant indicated during the interview that he did not report it because he was overseas and that his lawyer in the army had told him not to discuss or disclose anything about the investigation while it was proceeding. He also maintained that he was unaware that he needed to advise the NJDOC of the incident, since it did not result in criminal charges. When the investigation was completed and he received the DD-214, he submitted it to HR. He advised that the Chapter 10 discharge was not approved until November 2, 2015, and that he submitted the paperwork to the NJDOC shortly after that.

Appellant was questioned in the interview regarding the nature of the charges. He advised them that he was charged with touching another female soldier in Qatar when they were on leave at a beach party. He denied that the charges were "criminal," and maintained that the charges were administratively dismissed in connection with the Chapter 10 discharge. Appellant stated in the video interview that he was aware that he could have received a court martial and confinement, so he took the Chapter 10 discharge. He maintained that he was unaware that he had to report this incident, and that he had been advised by his attorney not to speak of it until the investigation was completed.

On cross-examination, Schlusselfeld acknowledged receipt of a letter from appellant's Defense Counsel Joseph A. Piasta who was a Caption, Judge Advocate. He wrote a letter on appellant's behalf regarding the matter, which stated that:

1. Appellant was alleged to have committed a violation of Article 93,120,128 and 134. Given the state of the evidence in the case and SFC Frazier's exemplary military service record, the case was dismissed prior to trial and SFC Frazier was discharged from the service.

2. In the course of my representation, I advised SFC Frazier to refrain from discussing matters related to his pending court martial with anyone other than his attorneys.

Schlusselfeld testified that NJDOC law enforcement rules and regulations require "an Officer to report all crimes, misconduct or unusual incidents which comes to the officer's attention during the performance of duty." He also testified that there was an obligation to repute an arrest within the forty-eight hours. Schlusselfeld testified that appellant should have advised of the incident that occurred in 2014, as soon as it happened, and that his failure to do so was a violation to the rules. He also believed that appellant was less than forthcoming in the initial interview and that the underlying conduct which occurred in December 2014, constituted conduct unbecoming.

**Lashay Johnson** has been in the National Guard for five years. She is a food service specialist with a rank of E-5. She was deployed with appellant's infantry unit

and was overseas in Qatar in December 2014. On December 9, 2014, the platoon attended a beach party. There were approximately 200 people there. She was there with her platoon. Appellant was a Sergeant First Class with a rank of E-7. He was her platoon sergeant. She testified that they were taken by bus to the beach party which was at the home of one of the diplomats. They were allowed to do whatever activity they wanted to during the day. She testified that there was alcohol there, but individuals were limited to three drinks. There is no one who is checking the amount that you drank but you are not supposed to have no more than three drinks. She stated that she did not violate the rule but that appellant had had too much to drink.

She testified that she was in line waiting to get her food for dinner and appellant was directly behind her. It was a long line and they were in it for about twenty minutes or so. She testified that appellant put his hands inside the front pocket of her hoodie sweatshirt and touched her stomach. He did this twice and then he put his hands in her back pockets. She testified that there were several other soldiers from the unit around and SPC Vincent Miseowich told appellant to knock it off. She testified that she was very uncomfortable and embarrassed but she did not say anything to appellant. She never stepped away or told him to stop. Later, when she went to sit down with her food, appellant sat right next. She testified that he put his hand on her leg and rubbed it. She stated that she never told him to stop because she was intimidated. She got up when another individual said they needed help finding their bag. Later on the bus, appellant kept kicking her foot under the seat. When they got back after the bus ride, he asked her if she was "like interested," but when she said no, that was it, and he left her alone

Ms. Johnson testified that the next day appellant came to her and apologized for his conduct. Later, she reported the incident to First Sergeant Kirkpatrick and it was then turned over for an investigation. She stated that after she reported the incident there was a no contact order, so appellant was not supposed to come near her. She testified that she reported appellant for violating the no contact order, when one of his friends asked her when she would be finished in the gym because appellant wanted to

use the gym. She conceded that he never came in the gym when she was there, but she reported him for violating the no contact order.

**Lieutenant Christopher Danielson** is employed by NJDOC, where he has worked for ten years. He is familiar with the policy and procedures of the Department and is familiar with the charges that were brought against the appellant in this matter. He testified that all new hires receive a copy of the policies and procedures and he identified the policies that were provided to the appellant. The appellant had acknowledged receipt of the policies. He testified that all NJDOC employees are reminded that they are accountable for their behavior on and off duty, and they are held to an enhanced standard of conduct. Likewise, they have an obligation to report things that happen off duty.

The first policy that he identified was Human Resources Bulletin 84-19, which stated that "Employees who are summoned, arrested or incarcerated as a result of a crime or an offense as defined by N.J.S.A. 2C, *Criminal Justice Code of New Jersey*, must advise their superior as soon as possible, and not more than forty-eight hours from the date of the summons, arrest or incarceration." These rules apply to matters which occur outside the jurisdiction of the State of New Jersey. The rule states that "appropriate disciplinary action" may be taken if the employee fails to follow the steps provided in the rule. Lieutenant Danielson testified that appellant should have advised the NJDOC as soon as the charges were brought against him in Qatar.

Lieutenant Danielson also referred to Article III, Section III of the Law Enforcement Personal Rules and Regulations. The provisions provide that "no officer shall act or behave, either in an official or private capacity, to the officers' discredit or to the discredit of the Department." The rules also prohibit making false or misleading statement or reports. He testified that appellant was not honest at first in the interview and that he should have advised that the discharge was OTH. Finally, Danielson testified that he is familiar with the hiring practices of the NJDOC and in his opinion the appellant would not be hired due to a conviction for a matter of a sexual nature. On

cross-examination, it was pointed out that there was no conviction of a crime, and the Chapter 10 discharge administratively dismissed the charges.

**Major John Chiulla** testified by telephone. He is Chief of Military Justice at the base in Fort Jackson, South Carolina. He has been in the military for thirteen years and was admitted to practice law in 2002. He has been both a prosecutor and a defense attorney for the military and he was called to discuss the nature of appellant's Chapter 10 discharge. He testified that a Chapter 10 discharge allows a solider to request separation from the military in the form of a discharge in lieu of a court-martial. You must admit that you are guilty of "one of the less included offenses which you have been charged with." You must also be aware that "you may" receive a less than honorable discharge or OTH. In addition, when you submit the Chapter 10 request, you must accept it when it is approved. You will not know what sort of discharge you are going to get when you submit the request but you submit it knowing that you may receive an OTH discharge. He stated that there is a way to receive an upgrade after the DD-214 issued.

Major Chiulla was not involved in the charges relating to appellant, but he reviewed the papers which were forwarded to him by the Deputy Attorney General, Paul Nieves. He testified that appellant received an administrative discharge. In other words he was separated from the military on an administrative charge. However, in order to submit a Chapter 10, one of the pending charges must have the potential for a criminal charge. He testified that he is not aware if the charges in this case were criminal but the charges were all administratively dismissed in connection with the Chapter 10 request.

For appellant:

**Donju Frazier** testified on his own behalf. He has been employed by the NJDOC for eight years. However, he was on active duty in the reserves for most of the time and the longest period of time that he was at NJDOC was eight months. He served in the Army and National Guard for sixteen years. Frazier testified that they had

an R & R day at a beach house of one of the Qatar government officials on December 9, 2014. His entire platoon was there and there were different things to do. He testified that he is aware of the three drink rule, but he violated the rule and had too much to drink. He acknowledged that he was intoxicated and that his behavior was inappropriate. He testified that he did not remember exactly what happened but that he was flirting with Johnson and put his arm around her. He acknowledged that he sat next to her and may have touched her leg when they were talking. He testified that she never told him that he was bothering her or to stop. He acknowledged that his behavior was inappropriate because he was intoxicated and he was a superior officer.

He testified that the next day, he knew that he had acted inappropriately and he apologized to Johnson. He also sent an email to his sergeant telling him that he was no longer qualified to be a supervisor because of what happened. The email stated as follows: "I am writing to tell you that I can no longer be in charge of the platoon or group. I am no longer mentally able to be in charge of my soldiers and lead them. How can I be a person of integrity if I cannot follow the same rules and regulations I am expecting my soldiers to do. I do not feel that I can be an effective leader to the group of persons." He was contacted by CID on December 16, 2016, and was given a lawyer. He testified that since the charges could have resulted in military confinement, his lawyer recommended that he apply for a Chapter 10 discharge. His lawyer told him not to discuss the matter while the matter was pending. He was not aware that he had an obligation to report the incident to the NJDOC.

Appellant testified that when he received the Chapter 10 discharge, he thought that the charges were all dismissed administratively and that they were not "criminal." He submitted the discharge papers to HR when he received them in November 2015, and returned to work shortly after that. He testified that he knew they said honorable discharge, but he thought it was possible that he did receive an honorable discharge due to his good record. He was also told that the less than honorable discharge could be upgraded. He was not unsure of why and did not inquire, nor did he advise the NJDOC that it was incorrect, since he did not know.

**Vincent J. Misiewicz** is a SPC in the Army and was in Qatar in December 2014. He was a witness to the incidents that occurred at the beach house on December 9, 2014. He testified that the party was at a beach house that belongs to a Qatar government official. They had different activities and you choose from or you could just go to the beach. He testified that appellant was acting crazy at the event and he witnessed him in the food line for dinner. He was standing right behind Johnson and he put his arm around her and was flirting with her. We told him to knock it off and told him to relax that he was married. He testified that Johnson seemed intoxicated and appellant was acting crazy which was out of character for him. He did not see anything other than him putting his arm around her. He fell asleep on the bus and did not see anything and did not see anything during dinner. He testified that Johnson seemed fine and they were just joking and bullshitting but that he thought it was inappropriate for appellant and that is why I told him to calm down.

**Toan Tran** is a staff sergeant E-6. Appellant was his staff sergeant. He was present at the beach party in Qatar on December 9, 2014, and was hanging out with appellant. It was a beach party for the soldiers and you could choose what activities that you want. They had beer and there was a limit of three beers, but it was not really enforced. The party was all day long, from sun up to sun down. Dinner was served buffet style and it was horrible. When you came in, you got in a line and picked the food you wanted and then went to a table in the same room. It was a long line and he was in line with appellant and did not notice anything unusual. He noticed that he and Johnson were talking and laughing. He got his dinner and sat down and did not see anything inappropriate happen. She did not seem upset and he never heard her make any comments or gestures indicating she was upset.

## FINDINGS OF FACT

The resolution of the charges against appellant requires that I make a credibility determination regarding the critical facts. The choice of accepting or rejecting the

witnesses' testimony or credibility rests with the finder of fact. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experiences and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718,749 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth. In re Perrone, 5 N.J. 514. 521-22 (1950). See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses, I FIND that appellants testimony was sincere and honest and I **FIND** that it was credible. I found that the testimony of Johnson was not credible. The remaining witnesses were honest and sincere and I found their testimony credible.

Accordingly, I **FIND**:

1. The appellant attended a party in Qatar on December 9, 2014. As a result of an incident that occurred at dinner, SPF Johnson filed charges against the appellant.

2. Charges were brought against appellant shortly after the incident and a CID investigation ensured at the Army.

3. During the pendency of the investigation, a no contact order was issued with respect to SPF Johnson and appellant and appellant was advised by his attorney not to discuss the matter with anyone.

4. Appellant was charged with inappropriate touching, sexual contact, assault, drunkenness and disorderly conduct. The charges were brought under the Uniform Code of Military Justice. It has not been demonstrated that they were criminal.

5. Through his attorney, appellant filed a request for a Chapter 10 discharge in lieu of a court-martial. Appellant was advised that the discharge "may be" classified as Other Than Honorable.

6. A Chapter 10 discharge was issued on November 2, 2014. The original discharge order listed the discharge as "honorable." The appellant did not falsify the discharge papers, nor did he know or should have known that there was an error in the characterization of the discharge.

7. The appellant forwarded the papers to the Human Relations Office of NJDOC on November 16, 2015, and returned to work on that same day.

8. Appellant was served with his Weingarten rights and interviewed by SID on the day of his return. The Weingarten form indicated that it related to "a failure to report a crime." The Weingarten rights did not indicate that the interview related to the 2014 incident in Qatar, nor did anyone advise him of the nature of the incident.

9. When appellant was asked about the specific incident, he advised SID of what occurred, and advised that the incident did not result in any criminal charges. Appellant also stated that he did not know that he had to report the incident and that his attorney advised him not to discuss the matter with anyone.

10. The discharge administratively dismissed all pending charges, criminal or otherwise against appellant.

11. Even assuming that the appellant had to admit to one of the lesser included charges in connection with the Chapter 10 filing, the papers do not specify which charge, nor

do they indicate that such action is tantamount to a plea of guilty to any criminal offense.

12. On December 9, 2014, appellant was intoxicated and acted inappropriately in his leadership position.

13. I make no other findings with respect to his conduct on December 9, 2014, as they were not demonstrated by a preponderance of the credible evidence.

## LEGAL DISCUSSION AND CONCLUSION

The Civil service employee's rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12:6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointment and broad tenure protection. See Essex Council Number 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1971); Mastrobattista v. Essex County Park Commission, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this State is to provide public officials with appropriate appointment, supervisory and other personnel authority in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). A public employee who is thus protected by the provision of the Civil Service Act may nonetheless be subject to major discipline for a wide variety of offenses connected to his or her employments. The general causes for such discipline are enumerated in N.J.A.C. 4a:2-2.3

"The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We can take judicial notice that such facilities, if not purely operational have a capacity to become tinderboxes." Bowden, supra. 268 N.J. Super. at 306. Because correction officers, like police are part of a quasi-military organization, they are held to the higher standard. A

correction officer represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public. Ibid.

In an appeal concerning major disciplinary action, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.S.A. 11:2-21; N.J.A.C. 4A:2-14 (a). This applies to both permanent career service employees and those in their working test period relative to such issues as removal, suspension, or fine and disciplinary demotion. N.J.S.A. 11A:2-14; N.J.S.A. 11A:2-6. The State has the burden to establish 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 Licence Revocation, 90 N.J. 550 (1980).

This matter involves a major disciplinary action brought by the respondent appointing authority against appellant seeking his removal. Specifically, appellant has been charged with violating the following offenses:

| | |
|---|---|
| C(8) | Falsification, Intentional Misstatement of Material Fact in Connection with Work, Employment Application, Attendance, or in any Record, Report, Investigation or Other Proceeding; |
| C(11) | Conduct Unbecoming an Employee; |
| E-1 | Violation of a Rule, Regulation, Policy, Procedure, Order or Administrative Decision. |
| C-12 | Other sufficient cause |
| HRB 84-19(as amended) | Failure to report |

1. Failure to Report

The NJDOC has charged appellant with a violation of HRB 84-19, which provides in relevant part that "Employees who are summoned, arrested or incarcerated as a result of a crime or an offense as defined by N.J.S.A. 2C, *Criminal Justice Code of New*

*Jersey*, must advise their superior as soon as possible, but not more than forty-eight hours from the date of the summons, arrest or incarceration." NJDOC argues that the term "summoned" has been applied and interpreted by the NJDOC as meaning the requested presence and it does not require a summons to be served on the employee to trigger the reporting requirements of the rule. However, the plain language of the rule requires reporting only if summoned, arrested or convicted under Title 2C of the New Jersey Code of Criminal Justice. NJDOC has not proven by a preponderance of the evidence that appellant was summoned, arrested or convicted under Title 2C. Moreover, the evidence demonstrated only that the military charges which were brought were all administratively dismissed.

I therefore **CONCLUDE** that the respondent has not satisfied its burden of proving that appellant's failure to report the 2014 incident in Qatar violated any of the rules of the NJDOC. I further **CONCLUDE** that NJDOC has not proven by a preponderance of the evidence that "admitting to one of the lesser included charges" was anything more than appellant admitting to drunkenness in the military context, which they failed to demonstrate is tantamount to criminal charges under Title 2C.

2. Falsification, Misrepresentation

The Preliminary and Final Notices of Disciplinary in this matter charge the appellant with falsifying the DD-214 which was provided by the appellant to the HR Department of NJDOC in November 2015. NJDOC has withdrawn this allegation as they were advised by the Military that it was their clerical error. NJDOC now claims that the appellant knew, or should have known that the original DD-214 was incorrect and had an obligation to advise them that it was incorrect. The testimony and the evidence in this matter did not demonstrate that appellant knew or should have known that the military orders were incorrect. On the contrary, the evidence and testimony demonstrated that appellant was advised and it was possible to obtain such a discharge in connection with a Chapter 10 request.

I therefore, **CONCUDE** that NJDOC has not proven by a preponderance of the evidence that appellant was guilty of falsification, intentional misrepresentation of material fact in connection with the presentation of the Honorable Discharge to the NJDOC. In addition, the state failed to prove by a preponderance of the credible evidence that appellant lied or made any material misstatement during his interview with SID. It was unclear from the Weingarten rights or anything that was initially said to appellant what the nature of the interrogation was. Moreover, when asked about happened in Qatar in December 2014, appellant was forthcoming and advised them of same. I therefore **CONCLUDE** that the NJDOC has not proven by a preponderance of the evidence that appellant was untruthful, intentionally misrepresented anything or was guilty of falsification.

3. Conduct Unbecoming

Conduct unbecoming a public employee is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A. 2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). And as is well settled in this jurisdiction, the conduct of law enforcement officials such as corrections officer is a much higher standard.

The allegations of conduct unbecoming relate to the underlying conduct of appellant in December 2014, while he was serving in the armed forces in Qatar. Employees of

the NJDOC are not only held to a higher standard, but this standard of conduct applies on and off duty. In this matter, the appellant conceded that he was intoxicated and acted inappropriately. Moreover, although the testimony of Johnson was less than credible, by appellant's own admission, there was flirting and unwanted touching, and he was a superior officer. Although the charges were administratively dismissed and did not amount to a plea of guilty to any criminal conduct, I **CONCLUDE** that appellant's actions did constitute conduct unbecoming of an employee.

The issue then becomes, not whether certain charges have been sustained, as appellant acknowledges being drunk and disorderly, but rather, the level of discipline to be imposed. NJDOC urges removal for this and other charges which have not been sustained, and thus, some level of discipline is appropriate.

## PENALTY

Once a determination is made that an employee has violated a statute, regulation or rule concerning his employment, the concept of progressive discipline must be considered. When dealing with the question of penalty in a de novo review of a disciplinary action against a civil service employee, the Merit System Board (i.e. now the Civil Service Commission) is required to evaluate the proofs and penalty on appeal, based on the charges. N.J.S.A. 11A:2-19; West New York v. Bock, 38 N.J. 500 (1962). With respect to the discipline, under the precedent established by Town of West New York v. Bock, supra, courts have stated, "[a]lthough we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, Id. at 523, 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).

Appellant's history, albeit short, reveals no disciplinary infractions. In determining the appropriate penalty to be imposed here, all aggravating and mitigating factors must be considered. The mitigating factors in this case are the appellant has no prior disciplinary history. In addition, it must be noted that he served in the armed forces without incident for sixteen years and was by all accounts a respected and "good officer." The other mitigating factor is that the appellant was in a stressful environment and immediately acknowledged his intoxication and behavior were improper. I therefore, **CONCLUDE** that an appropriate penalty for this violation is a one hundred and twenty day suspension.

## ORDER

The charge of C-8 – Falsification; intentional misstatement of material fact in connection with work is dismissed. The charge C-11 – Conduct Unbecoming an Employee is sustained; the charge of E-1 – Violation of a Rule, Regulation, Policy, Procedure, Order or Administrative Decision is dismissed. I **ORDER** that a penalty of one hundred and twenty days be imposed. Therefore, I **ORDER** the action taken by NJDOC in removing appellant from his position as a state correction officer is **MODIFIED.** The appellant shall serve as penalty a one hundred and twenty day suspension.

Since the penalty has been modified, I **ORDER** that appellant is entitled to back pay, benefits, and seniority pursuant to N.J.A.C. 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to N.J.A.C. 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially the entire primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. See Johnny Walcott v. City of Plainfield, 282 N.J. Super, 121, 128 (App. Div. 1995); James L. Smith v. Department of Personnel, Docket No. A-1489-02T2 (App. Div. March 18, 2004); In the Matter of Robert Dean (MSB, September 21, 1989). In the case at hand, while the penalty was modified, the conduct unbecoming charge

was sustained and imposed major discipline. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. See In the Matter of Bazyt Bergus (MSB, decided December 19, 2000), aff'd, Bazyt Bergus v. City of Newark, Docket No. A-3382-00T5 (App. Div. June 3, 2002); In the Matter of Mario Simmons (MSB, decided October 26, 1999). See also, In the Matter of Mario Simmons (MSB, October 26, 1999). See also, In the Matter of Kathleen Rhoads (MSB, decided September 10, 2002) (Counsel fees denied where removal on charges of insubordination, inability to perform duties, conduct unbecoming a public employee and neglect of duty was modified to a fifteen-day suspension on the charge of neglect of duty).

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 12, 2016
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: August 12, 2016 (emailed)

Date Mailed to Parties: August 12, 2016 (emailed)

SGC/mel

# APPENDIX

## WITNESSES

**For Appellant:**

Donju Frazier

Toan Tran

Vincent Miscievcz

**For Respondent:**

Matthew Schlusselfeld

Lashay Johnson

Lieutenant Christopher Danielson

Major John Chiulla

## EXHIBITS

**Joint Exhibits**

R-1 Final Notice of Disciplinary Action dated March 29, 2016

R-2 Work History of Donju Frazier

R-3 DD-214 dated November 6, 2016 Honorable

R-4 NJDOC Special Investigations Division Administrative Investigation of Matthew Schusselfeld Regarding Donju Frazier Case 2015-12-14NJSP

R-5 Memorandum of Lieutenant General James Terry dated November 2, 2015

R-6 Order dated December 3, 2015 for Donju Frazier with Report dated of November 6, 2016 to Fort Jackson, SC

R-7 Order dated December 1, 2015 Reducing Donju Frazier to a Private

R-10 Charge Sheet on Donju Frazier (DD Form 458)

R-13 Memorandum dated April 24, 2016 of LG James L. Terry