

that the appellant's actions violated departmental policies concerning security procedures and conduct. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In her initial decision, the ALJ found that the all Correction Officers and civilians were required to pass through a walk-through metal detector at a security checkpoint when entering the Essex County Correctional Facility. Per departmental procedures, if a person set off a walk-through metal detector when passing through it, a County Correction Officer manning the security checkpoint was required to scan that individual with a handheld metal detector (wand). When the appellant arrived at the checkpoint at the start of her shift on July 10, 2014, the walk-through metal detector she traversed indicated that a metal object was present near her waist. A County Correction Officer assigned to the checkpoint then directed the appellant to empty her pockets and submit to a scan by the wand. The appellant did not comply with those instructions and instead proceeded into a secured area of the facility without obtaining clearance. The ALJ noted that a video confirmed that that the appellant did not submit herself to a search using the wand. The aforementioned County Correction Officer then contacted the Shift Commander, a County Correction Lieutenant, and apprised him of what had transpired at the checkpoint. Thereafter, the Shift Commander ordered the appellant to return to the checkpoint and go through the metal detector again. The appellant complied, returning to the checkpoint, whereupon she emptied her pockets and permitted the aforementioned County Correction Officer to scan her. The ALJ did not make any findings concerning the allegations that the appellant threatened that County Correction Officer.

Based upon the foregoing, the ALJ found that the appellant's initial refusal to submit to a scan with the wand, as instructed, demonstrated conduct unbecoming a public employee for having a total disregard and disrespect for a fellow officer and of departmental policies. Additionally, the ALJ sustained the charge of other sufficient cause based upon her finding that the appellant disregarded the established security policies for the facility. Therefore, the ALJ affirmed the appellant's 15 working day suspension.

In her exceptions, the appellant argues that her 15 working day suspension should be reduced or eliminated, because the ALJ did not sustain the allegations that she made threatening remarks and failed to consider the lack of prior discipline in her 20 year record of service with the appointing authority. Furthermore, the appellant contends that the ALJ failed to consider other mitigating circumstances, including the fact that both the appellant and the aforementioned County Correction Officer knew that the radio and glasses she carried each day in her pockets routinely triggered the metal detectors in the facility.

In reply, the appointing authority argues that the ALJ's findings concerning the appellant's failure to comply with its security procedures alone justify her 15 working day suspension. It submits that its Departmental Policy PS.CUS.054 (Security and Facility Entry Checkpoints) states that "[t]he person being searched shall make every effort necessary to facilitate the search" and it emphasizes that County Correction Officers, as law enforcement officers, are held to a higher standard of conduct compared to other public employees.

The appointing authority also contends that while the ALJ did not make any findings regarding the appellant's alleged use of foul and threatening language towards the County Correction Officer assigned to the checkpoint, the testimony of three of its officers support its claim that the appellant's behavior violated several of its rules governing conduct.

Upon its *de novo* review of the record, the Commission agrees with the ALJ regarding the charges but does not adopt the ALJ's recommendation to uphold the 15 working day suspension. In determining the proper penalty, the Commission's review is *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). Further, the Commission notes that a law enforcement officer is held to a higher standard than a civilian public employee. *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). The Commission is particularly mindful of this standard when disciplinary action is taken against a supervisory law enforcement officer. Upon an independent review of the record and in consideration of the appellant's prior record of service, the Commission concludes that a 15 working day suspension is too severe of a penalty. In the instant matter, the appellant's disciplinary history does not evidence any formal discipline since she began her service with the appointing authority in 1994. However, the Commission emphasizes that the appellant is employed in a paramilitary setting and is charged with maintaining security, discipline and order in a correctional facility. The precise requirements of such a position are not mere technicalities but are established and must be adhered to in

order to ensure the utmost security of the facility. This is particularly true where, as here, the appellant is serving in a supervisory position. Here, the appellant's failure to adhere to facility security procedures by refusing to empty her pockets and submit to a search by wand after setting off a walk-through metal detector at a secured checkpoint at the Essex County Correctional Facility is a serious matter. The appellant's conduct warrants major discipline. Notwithstanding that the appellant's employment history reveals a lack of formal discipline in her approximately 20 years of service preceding the underlying incident, the Commission finds that a 10 working day suspension on these charges is appropriate.

Since the penalty has been modified, the appellant is entitled to five days of 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)*, an award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. See *Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. Mar. 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this case, the Commission agreed with the ALJ's determination sustaining most of the charges and only modified the penalty. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C. 4A:2-2.12(a)*, counsel fees must be denied.

ORDER

The Commission finds that the appointing authority's action in imposing a 15 working day suspension was not justified. Therefore, the Commission modifies the 15 working day suspension to a 10 working day suspension. The Commission further orders that the appellant be granted five days of back pay, benefits and seniority. The amount of back pay awarded is to be reduced and mitigated to the extent of any income earned during this period. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

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

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 27TH DAY OF MARCH, 2018

Deirdre' L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 07129-15

AGENCY DKT. NO. 2015-2912

**IN THE MATTER OF PHYLLIS SLADE,
ESSEX COUNTY DEPARTMENT OF
CORRECTIONS.**

Gail Oxfeld Kanef, Esq., for appellant (Oxfeld Cohen, P.C.)

Jill Caffrey, Assistant County Counsel, for respondent Essex County

Record Closed: December 14, 2017

Decided: December 19, 2017

BEFORE JOANN LASALA CANDIDO, ALAJ:

STATEMENT OF THE CASE

Appellant, Phyllis Slade, a Correction Officer, appealed the disciplinary action of a fifteen-day suspension by Essex County Department of Corrections (DOC or Appointing Authority.) for non-compliance of policy and procedure while coming through the security check point at the start of her shift on July 10, 2014.

PROCEDURAL HISTORY

On May 15, 2015, the Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), for a hearing as a contested matter pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A hearing was held by Administrative Law Judge Bedrin-Murray on August 8, 2017. The parties submitted their post-hearing briefs on November 2, 2017. The matter was reassigned to me on December 11, 2017. I held a telephone conference with counsel on December 14, 2017, and it was agreed that I would decide the matter after review of the file with the exhibits entered into evidence. The appointing authority sustained the following:

CHARGES

CHARGE(S): N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming a public employee and N.J.A.C. 4A:2-2.3(a)(12) other sufficient cause; Violation of Department Policy PS.CUS.054 Security at Facility Entry Points; PS.CUS.006.27 Security Checkpoint Officer) (Violation of Departmental Rules and Regulations 3:1.14 Conduct; 3:2.1 General Conduct on Duty; #:2.12 Search;3:9.5 Courtesy and Civility).

SPECIFICATION(S): The suspension is based upon the following allegations: On July 10, 2014, appellant acted in an unprofessional manner while entering the facility at the security check-point. Officer Albert Aponte attempted to screen Sgt. P. Slade upon entering the facility; at which time, Sgt. P. Slade rushed passed the checkpoint. Officer A Aponte reported the incident to shift Commander Lieutenant Mike Caggiano. Lt. M. Caggiano ordered Sgt. Slade to return to the checkpoint to be properly screened. Sgt. Slade returned to the checkpoint and made a threatening

statement towards Officer Aponte. Sgt. Slade stated to Officer Aponte, "this is bullshit; I'll punch you in the face; I'll f***ing hurt you." This was witnessed by Officer Chris Kraynanski, Officer Brian Hanlon and Sergeant Mike Robertiello; who all wrote statements confirming Sgt. Slade's actions. Investigating Lieutenant Joe Badgley; along with video surveillance footage, confirmed Sgt. Slade's actions and statements given by the witnesses. Sgt. Slade's actions were unwarranted, unnecessary and unprovoked.

FINDINGS OF FACTS

Based on the moving papers, certifications, and other relevant evidence I **FIND as FACT:**

1. On December 5, 1994, the Appointing Authority hired Appellant, Phyllis Slade in the position of Correction Officer. She was promoted to sergeant in 2012.
2. All Correction Officers and civilians must pass through a security checkpoint before entering the facility. Sergeant Alberto Aponte is assigned to work this checkpoint. Aponte will utilize a wand if the metal detector beeps. He received training on the use of metal detectors and the detection of contraband.
3. On July 10, 2014, Appellant arrived at the facility at 5:46:50 a.m. at the start of her shift and set off the metal detector at waist level while walking through. Appellant would not permit Aponte to use the wand and she refused to empty her pockets. He contacted Shift Commander Lieutenant Cadgiano to advise that Appellant did not clear the metal detector and refused to be scanned.
4. At approximately 6:13 a.m., Appellant was ordered by Cadgiano to return to the checkpoint area to go through the metal detector again. The Appellant complied this time and emptied her pockets and permitted Aponte to scan her.
5. The video clearly confirms that Appellant did not avail herself to the hand held metal detector when she entered the security checkpoint while all other officers did pursuant to policy 3:2.12 whereby all persons are subject to search when

entering the institution. Appellant violated this policy when entering the security checkpoint and not permitting the officer to use the hand-held metal detector when the walk through detector beeped.

JOINT STIPULATIONS OF FACT

1. On December 5, 1994, Essex County Department of Public Safety and Corrections hired Phyllis Slade as a Correction Officer. Slade was promoted to Sergeant in 2012.
2. On September 10, 2014, Slade was served with a Preliminary Notice of Disciplinary Action Form dated September 10, 2014.
3. A Disciplinary Hearing was held on December 17, 2014.
4. On April 16, 2015, Slade was served with a Final Notice of Disciplinary Action dated March 18, 2015, suspending Slade for fifteen days.
5. Slade served the suspension on April 22-26, April 29-30, May 1-3 and May 6-10, 2015.

DISCUSSION

Under N.J.A.C. 4A:2-2.3 (a)(6) a public employee can be disciplined for conduct unbecoming a public employee. Whether an employee's behavior "constitutes conduct unbecoming a public employee is primarily a question of law." Karins v. Atlantic City, 152 N.J. 532, 553 (1998). Conduct unbecoming is an extremely fact specific issue and describes any conduct that undermines public confidence in municipal employees or services. Id. at 554. The appointing authority must establish the employee engaged in conduct unbecoming a public employee by a preponderance of the credible evidence. Washington v. City of Trenton, CSV 4211-03, Initial Decision (November 3, 2005), adopted, Merit Sys. Bd. (December 13, 2005) <<http://njlaw.rutgers.edu/collections/oal/final/csv4211-03.pdf>>.

The Codification Policy Custody .054 entitled "Security at the Facility Center Points" revised on January 10, 2014 reads in part that should an individual entering and not

clear the metal detector, then handheld metal detector shall be used to scan for contraband. The person subject to the search shall make every effort necessary to facilitate the search. It is evident from the video presented that Appellant deliberately did not stop for Aponte to utilize the hand-held detector when the metal detector beeped showing an issue at Appellant's waist area. This clearly represents conduct unbecoming for having a total disregard and disrespect of a fellow officer and of policy and procedure when not making herself available for a mandatory hand-held metal detector search after beeping while going through the metal detector. I therefore **CONCLUDE** that respondent has satisfied its burden of proving, by a preponderance of the credible evidence conduct unbecoming a public employee.

There is no definition in the New Jersey Administrative Code for other sufficient cause. Other sufficient cause is generally defined in the charges against appellant. The charge of other sufficient cause has been dismissed when "respondent has not given any substance to the allegation." Simmons v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm'r (April 26, 2006), <<http://njlaw.rutgers.edu/collections/oal/final/csv9122-99.pdf>>. The FNDA states that the charge for other sufficient cause is sustained for violating Department Policy PS.CUS.054 Security at Facility Entry Points; PS.CUS.006.27 Security Checkpoint Officer) (Violation of Departmental Rules and Regulations 3:1.14 Conduct; 3:2.1 General Conduct on Duty; #:2.12 Search;3:9.5 Courtesy and Civility). Because I find the respondent to have proven the above-named charges by a preponderance of the credible evidence, that Appellant disregarded policy set in place for the security of the Institution, I **CONCLUDE** that respondent has satisfied its burden of proving, by a preponderance of the credible evidence of other sufficient cause.¹

Based upon all of the foregoing, including the evidence and certifications submitted, I **CONCLUDE** that Appellant violated the policy of the Institution when she purposely did not permit the security officer to perform his job by using the hand held

¹ Because the video entered into evidence had no audio, I am unable to determine what was uttered by Appellant at the time she was ordered to come back to the security area and I make no findings as to same.

detector after appellant beeped while walking through the metal detector, and I further **CONCLUDE** that respondent has met its burden of proving, by a preponderance of the credible evidence, the charges against appellant.

ORDER

It is hereby **ORDERED** that the fifteen-day suspension of appellant is hereby **AFFIRMED** and her appeal is **DISMISSED**.

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

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

December 19, 2017
DATE

Joann Lasala Candido
JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

December 19, 2017
Joann Lasala Candido

Date Mailed to Parties: December 22, 2017
ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Witnesses:

For Appellant:

Phyllis Slade

For respondent:

Alfaro Ortiz

Alberto Aponte

Michael Robertiello

Christopher Kraynanski

Herbert Hamlin

Exhibits

For Appellant:

P-1 Video dated July 10, 2014

P-2 Appellant's Statement dated July 10, 2014

For respondent:

R-1 Preliminary Notice of Disciplinary Action dated September 10, 2014

R-2 Final Notice of Disciplinary Action dated March 18, 2015

R-3 Aponte Incident Report dated July 10, 2014

R-4 Robertiello Incident Report dated July 10, 2014

R-5 Kraynanski Incident Report dated July 10, 2014

R-6 Rules and Regulations Manual

R-7 Policy

R-8 Security at Facility Entry Points Policy