STATE OF NEW JERSEY

In the Matter of Dallas Newman
Bayside State Prison, Department of Corrections

CSC DKT. NOS. 2017-528 & 2017-529
OAL DKT. NO. CSR 13010-16
(Consolidated)

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

**ISSUED: MAY 25, 2018 BW**

The appeals of Dallas Newman, Senior Correction Officer, Bayside State Prison, Department of Corrections, two removals effective August 5, 2016, on charges, were heard by Administrative Law Judge Dorothy Incarvito-Garrabrant, who rendered her initial decision on April 18, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

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 (Commission), at its meeting of May 23, 2018, 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 appeals of Dallas Newman.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré 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
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Trenton, New Jersey 08625-0312

Attachment

**State of New Jersey**
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. CSR 13010-2016
AGENCY DKT. NO. N/A

**IN THE MATTER OF DALLAS NEWMAN,**
**BAYSIDE STATE PRISON,**
**DEPARTMENT OF CORRECTIONS.**

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**William Blaney,** Esq. for appellant Dallas Newman (Blaney & Karavan, attorneys)

**Emily M. Bisnauth**, Deputy Attorney General, for respondent, Bayside State Prison (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: January 8, 2018 Decided: April 18, 2018

BEFORE **DOROTHY INCARVITO-GARRABRANT**, ALJ:

## STATEMENT OF THE CASE

Appellant, Dallas Newman, a Senior Corrections Officer at the Ancora Satellite facility of Bayside State Prison, (BSP),[1] Department of Corrections, (respondent or DOC), appeals from the determination of respondent that he be terminated, pursuant to a first Final Notice of Disciplinary Action (FNDA), dated August 5, 2016, for violations of N.J.S.A 52:13D-23 Uniform Ethics Code; N.J.A.C. 4A:2-2.3(a)(6) conduct unbecoming an employee; and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11), specifically violations of Human Resource Bulletin (HRB) 84-17, as amended; C(11) conduct

[1] Ancora is a minimal security unit facility, which is a satellite unit of BSP located on the grounds of Ancora Psychiatric Hospital in Camden County.

unbecoming an employee; E(1) violation of a rule, regulation, policy, procedure order or administrative decision; and E(2) intentional use or misuse of authority or position, (R-4); and the determination of respondent that he be terminated pursuant to a second FNDA dated August 5, 2016, for violations of N.J.A.C. 4A:2-2.3(a)(6) conduct unbecoming an employee; and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11), specifically violations of Human Resource Bulletin (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; C(11), conduct unbecoming an employee; D(4) improper or unauthorized contact with inmate-undue familiarity with inmates, parolees, their families or friends; D(6a) loss or careless control of keys, pager/beepers or cellular phones; D(6b) loss or careless control of radios, mace, or handcuffs; E(1) violation of rule, regulation, policy, procedure, order or administrative decision. (R-2.)

The appellant denies the allegations that he falsified information or lied during an investigation, that he was unduly familiar with an inmate, a parolee, their family, or friends, that he took inmates outside of the facility for them to repair his personal vehicles or property, or that he carelessly lost control of his radio and keys during a shift change. Appellant further contends that the charges brought against him were not timely filed. He also contends that he was labeled as a "bad employee" after a workplace injury led to an opioid addiction, from which he recovered after treatment. As a result, he maintains he was targeted for termination with these false and unsubstantiated allegations.

## PROCEDURAL HISTORY

On May 13, 2016, respondent issued a first Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications against appellant. (R-3.) On July 12, 2016, respondent issued a second PNDA setting forth the charges and specifications against appellant. (R-1.) Following a departmental hearing on July 15, 2016, the respondent issued Final Notices of Disciplinary Action on August 5, 2016, sustaining the charges brought in both preliminary notices and terminating appellant from employment. (R-2 and R-4.) Appellant filed a timely notice of appeal. The matter was

transmitted to the Office of Administrative Law on August 26, 2016, for hearing as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13.

On February 7, 2017, the Honorable Dean J. Buono, A.L.J. denied appellant's evidentiary motion to suppress appellant's cellular telephone records obtained pursuant to a valid Camden County Communication Data Warrant (CDW).

The hearing in this matter was held on June 21, August 29, and October 19, 2017. The parties filed post-hearing briefs and the record closed on January 8, 2018.[2]

## FACTUAL DISCUSSION

### *Testimony*

**For Respondent**

**Edward Soltys** (Soltys) is a Principal Investigator in the Special Investigations Division (SID) for DOC. He has been employed by DOC for twenty years and became a Principal Investigator in 2015. Soltys participated in the interviews conducted in this matter with Principal Investigator Stephen Manera. He also contacted Verizon to obtain a "key" from Verizon. The key explained what type of data was included within the columns on the telephone records produced pursuant to the valid CDW.[3]

**Stephen Manera** (Manera) is a now retired Principal Investigator for DOC's SID. He was employed by DOC for approximately twenty years. During his employment as an investigator, his job duties included conducting investigations, interviewing witnesses, reviewing documents and evidence, and writing reports. Initially, Manera was assigned to investigate the appellant relative to criminal allegations. However, the investigation became administrative after the Camden County Prosecutor's Office issued a declination to prosecute letter on March 28, 2016. Thereafter, the matter was remanded to SID, which was tasked with continuing their investigation for further investigation and action. Manera issued a supplemental report dated April 7, 2016. (R-25.).

[2] An extension of time until April 18, 2018, was granted for the filing of this initial Decision.
[3] The key was obtained after the local hearing.

As part of the criminal investigation of appellant, and another BSP senior corrections officer, Manera reviewed appellant's personnel file, and also applied for and received the CDW, which allowed for disclosure of appellant's cellular phone records. (R-36-R-38.)[4] Manera explained that the cellular records included the person receiving the call, the date, duration of the call, and whether the call was incoming or outgoing. (R-40.)

While conducting the investigation, Manera received information relative to an alleged relationship between appellant and L.M., the father of inmate D.M., who had been incarcerated at Ancora and worked on a maintenance detail assigned to appellant. Manera interviewed L.M. and recorded the interview.

During that interview, L.M. stated that he knew appellant through his son, D.M., who had been incarcerated in the Ancora facility of BSP. L.M. provided his cell phone number, ending in X423, to Manera and stated that he spoke to appellant on the phone. Also, L.M. showed Manera that he had saved appellant's phone number, ending in X609, in his phone under appellant's first name, "Dallas." L.M. stated that he provided appellant with baked ziti to take to his son, D.M., while he was incarcerated in Ancora. Appellant had delivered this food to D.M. D.M. had told L.M. that he and appellant were good friends, and that after his release D.M. and appellant were going to get in shape together.[5]

Manera confirmed numerous cellular communications between appellant and L.M., during and after the time D.M. was incarcerated at BSP. (R-40.) There were thirty communications, which were recorded in the telephone records between September 15, 2013 and September 1, 2014, produced pursuant to the CDW.[6] Manera stated there were approximately sixty communications. D.M. was released from BSP to a half-way house.[7] However, Manera did not know when D.M. was released or the duration of

[4] The other Senior Corrections Officer was criminally charged.
[5] L.M.'s statements were recorded on a CD. (R-45.)
[6] The cellular records were admitted into evidence as R-40. They detail appellant's cellular communications during the period from September 15, 2013 and September 1, 2014. There are thirty cellular communications between appellant and L.M. during that period. It is noted that the records for the period between March 1, 2013 and September 15, 2013, which were produced pursuant to the CDW, were not submitted in this proceeding.
[7] D.M. was still under the custody and control of DOC while he was in this half-way house.

D.M.'s sentence at the half-way house. Thereafter, D.M. became deceased in October 2013.

Additionally, during the criminal investigation, Manera was also provided with information that appellant parked his truck with attached fifth wheel camper at BSP and took an inmate, J.L., outside of the facility to repair it on July 16, 2014. A group of inmates were assigned to the H07 work detail, the function of which was to complete maintenance tasks inside and outside of the BSP facility. They were permitted to leave the facility to complete the tasks and returned back via DOC transport to Ancora each time to remain in custody. Manera interviewed members of the H07 detail and testified that several indicated that appellant and an inmate were seen near the camper, outside the facility's perimeter on July 16, 2014. (R-24.) One inmate on the work detail saw J.L. with appellant outside the perimeter of the facility.

As a result, J.L was interviewed by Manera and SID investigators on July 24, 2014. (R-46.)[8] Manera testified that he made no promises or threats to J.L. to entice his statement. During the interview, J.L. stated that he was an inmate at Ancora and that he worked on appellant's truck and camper outside the facility's perimeter on three separate occasions. J.L. did not indicate the dates of the first two repairs. He made mistakes during his statement about the date on which he completed the third repair. In a prehearing conference with investigators, J.L. had provided a different date than in his taped interview. He corrected the date in the interview.

J.L. completed the truck and camper repairs, including repairs to the hot water system, the vehicle suspension, and the motor which lifts the camper off the towing truck's bed, with tools brought from within Ancora. During the interview J.L. stated that relative to the third repair, he and appellant did not exit through the metal detector. Instead, they left through an area in the gate shed, where the table had been pulled away from the

[8] J.L.'s statements were recorded on a DVD. (R-46.) After the interview, J.L. was transferred to a different facility for his safety; however, it is unknown whether the transfer resulted from his interview. J.L. was not produced by the respondent to testify. Respondent stated that J.L. might not have been in its custody at the time of this proceeding, and therefore, could not be produced to testify. Respondent stated that it did not subpoena J.L. to testify in this hearing.

metal detector by appellant. While completing the third repair, the H07 details van returned to the facility. J.L. stated that appellant told him to go back inside.

Additionally, in his statement, J.L. provided the make and color of appellant's truck and other personal information about appellant, including his wife's and children's names, his residence, and the family's hobbies. J.L. stated that appellant would bring chicken into the facility for him to cook, and that he learned appellant's personal information because he hung out with appellant in the general assignment office to which appellant was assigned. He also crafted personal items for the appellant and his family.

Manera testified that he corroborated J.L.'s statements with records in appellant's personnel file and was not concerned that J.L. confused the dates for the repairs, since inmates are not permitted to have watches. Manera stated that J.L. had a pre-interview conference with J.L., during which he was given information about the questions he was going to be asked.

Manera also interviewed Officer Gressel, who was responsible for counting the inmates at the end of a shift on the night of July 16, 2014. Although he counted J.L. as being in the facility, he could not definitely state where J.L. actually was, because some inmates are permitted to be off of the unit. They are finishing up their duties like locking up the maintenance shop. No officer ever saw J.L. outside of the facility's secured perimeter. (R-24.)

Finally, during his investigation, Manera reviewed surveillance photographs from the gate shed entrance/exit from the Ancora facility on July 16, 2014. One photograph showed appellant passing through a metal detector to leave after his shift. A subsequent photograph showed appellant's keys and radio sitting on a table next to the metal detector. (R-28D & R-28E.) Manera interviewed Officer Luis Benvenuti (Benvenuti), who was the officer to whom appellant was to transfer his radio and keys on July 16, 2014. Benvenuti reported that appellant had already departed without handing off his keys and radio. Appellant had left those on the table.

On March 28, 2016, a declination to prosecute letter was issued by the Camden County Prosecutor's Office relative to appellant. The investigation of appellant changed from a criminal to an administrative SID investigation. Manera was tasked with continuing the investigation. On April 6, 2016, Manera and Soltys interviewed appellant, who was accompanied by his union representative Gerald Gribble. The interview was recorded. (R-44.) During the interview, appellant was questioned about all of the above referenced facts and circumstances. He was advised that his recorded interview statement would serve as his official statement and that by not telling the truth he would be falsifying his report.

Appellant stated that his truck and camper were parked at BSP on July 16, 2014, because the lift motor, which allowed the camper to be removed from the truck, malfunctioned, upon his return from a vacation the previous day. He did not have the part to fix it. Until it was fixed, the camper could not be removed from the truck.

Appellant stated that he knew J.L. and that J.L. had worked for him on his work/maintenance detail. J.L. was a leader on that detail and had access to tools. Appellant denied ever taking J.L. out of the perimeter gate to work on his camper. Appellant indicated that he was not friendly with J.L. and that J.L. could have learned personal information about him in various ways, including overhearing discussions between officers or on the internet.

In relation to L.M., appellant was provided a phone number and asked if he had ever received calls from D.M.'s family. Appellant denied the phone calls. When investigators presented the phone records, appellant then offered that, "there was a guy. An older man from Mays Landing that had an old truck at our facility when he was visiting. I gave this guy a jump. He worked at Home Depot." Appellant stated that he gave L.M. a jump at 2:00 p.m. and that this was the time for visits with inmates. Appellant stated "yeah" in response to the investigator's question "you have a guy parked at the Ancora parking lot; you know he was there for a visit?"

Appellant indicated that L.M. had two sons who had been incarcerated. Appellant denied knowing them. However, subsequently, appellant stated that one son was an

inmate at Ancora, but he did not know who that inmate was and did not know that inmate's last name. Thereafter, appellant stated that D.M. worked in the kitchen at Ancora.

Appellant later stated that he met L.M. again at Home Depot, at which time he and L.M. recognized each other. L.M. helped him out with some electrical questions and issues. Appellant explained that L.M. was a union electrical worker. Appellant was doing construction at his home and needed help. The appellant gave L.M. his phone number. Appellant got electrical advice from L.M. by phone on numerous occasions. In response to questioning, appellant stated that he could have had over sixty calls with L.M. Appellant stated, that "electrical is no joke, it could burn your house down."

During the continued questioning, investigators asked appellant about L.M.'s son. Appellant stated that he did not know what happened to him. Appellant denied bringing any food into Ancora for L.M.'s son. Appellant never reported his out-of-work contacts with L.M. to BSP and indicated that he never thought he should.

Subsequently during the interview, investigators asked appellant if D.M. ever came up in conversations with L.M. The appellant rephrased the question and inquired, "what that his son's (sic) locked up?" Investigator Soltys responded in the affirmative, and asked if L.M. asked "how's my son doing? Stuff like that." Appellant stated "yeah, it could have, definitely." In response to questions about the context in which L.M. spoke to appellant about D.M., appellant stated that it was "small talk about his son" and that L.M. asked him "maybe you seen (sic) him in there. How's he doing?" Subsequent to D.M.'s release from Ancora and a halfway house, L.M. called appellant for help, when D.M. took L.M.'s truck, and could not be found. On October 4, 2013, L.M. also called appellant to tell him D.M. had died. The calls between appellant and L.M. continued after D.M.'s death.

During the interview, investigators questioned appellant about the hand-off of his keys and radio on July 16, 2014. Appellant stated it was his practice to leave the items and his cuffs on the table at the exit near the metal detector, if he did not personally hand them over to the next officer. He stated that he had already walked out on the day in question and confirmed that he would head over to the gate to leave the facility after his shift, when last count was done in the unit.

Manera testified that he did not know appellant outside of work. He stated that he had no stake in the outcome of this hearing.

**Albert Ferrari** (Ferrari), Lieutenant, testified that he has been employed by the DOC for twenty-three years. Twenty-two of those years he has served at BSP where he was the Administrative Lieutenant. His duties included being responsible for overseeing the policy, procedures, rules and regulations, and discipline at NJSP. Two codifications of the rules, regulations and procedures, the Handbook of Information and Rules for Employees of the New Jersey DOC and Law Enforcement Personnel Rules and Regulations primarily govern the actions of law enforcement officers.

Ferrari explained pertinent portions of the Handbook of Information and Rules for Employees of the New Jersey DOC. (R-7.) Officers cannot engage in unduly familiar relationships with inmates or their family members because it can corrupt the officer and lead to possibilities for corruption, which place the officer, inmates, civilians and the public in danger. The Handbook provides in the General Principles, Subsection C that employees are prevented from "becoming unduly familiar with any inmate or group of inmates or permit[ting] himself to become obligated in any way to an inmate or his family; a parolee or his family." General Rules and Regulations, subsection K provides that "employees must not give or receive from any inmate or parolee or any inmate or parolee's friend, relative, or representative anything in the nature of a gift or promise or favor, however trivial." Appellant received training on undue familiarity and acknowledged receipt of the handbook, rules and regulations, and ethics code. (R-7 – R-15.)

Pursuant to the Law Enforcement Personnel Rules and Regulations, Article III, Section 4, "no officer shall become unduly familiar with inmates who are incarcerated, on community release, or on parole status, within one year of the completion or vacating of all court imposed sentences or while the former inmate is under any form of criminal justice jurisdiction. An officer shall report all prior relationships with inmates or parolees in writing to the Administrator or his designee." (R-8.) The one-year time period begins when the inmate is released from DOC's custody and control. Ferrari explained that the

Handbook and the Personnel Rules and Regulations must be read together. Therefore, the one-year prohibition period includes the former inmates' family and friends.

Pursuant to Article III, Section 3, the ethical standard for law enforcement officers is that, "no officer shall act or behave either in an official or private capacity, to the officer's discredit, or to the discredit of the Department. Officers are public servants twenty-four hours a day and will be held to the law enforcement higher standard both on and off duty."

Unduly familiar relationships violate the public trust, by compromising the officer and place the officers, facility, inmates, and community at risk. Ferrari testified that it is inappropriate for an inmate at BSP to work on the personal vehicles of officers.

BSP Level III, Internal Management Procedure, (IMO), 400 applies to facilities within the BSP complex. (R-6.) Subsection 17 required that, "as the officer being relieved it is your responsibility to pass on all necessary equipment, keys, and information to the oncoming officer." Appellant violated this requirement by leaving a radio and keys on a table. That action was insufficient to satisfy the pass on requirement. Once appellant left his radio and keys on the table, he lost control over them or carelessly controlled them.

Ferrari indicated that providing false information causes safety issues.

Ferrari discussed the ranges of penalties for the offenses appellant was charged with in this matter. He explained that the charges are identified in HRB 84-17, and that the level of punishment depends on the totality of the circumstances and egregious nature of the actions.

Ferrari testified that he had no bias against appellant. He stated that he had no stake in the outcome of this hearing.

**For Appellant**

**Dallas Newman**, appellant, a Senior Corrections officer, testified that he began working for the DOC in 2001. Appellant suffered a workplace injury in 2011, for which he was prescribed oxycodone, to which he subsequently became addicted. As a result, he sought help from his union and completed an inpatient rehabilitation program. Appellant explained that prior to the treatment he had no disciplinary issues. This changed after he sought help and treatment. Appellant testified that he had had difficulties with Ferrari relative to inmate assignments and overtime.

Appellant denied taking J.L. outside the secured perimeter to work on his truck or camper, and that he ever had J.L. produce any personal items for him or his family. Appellant stated that inmates often pick up personal information about officers by listening to discussions between the officers or through the internet. He also indicated that inmates get personal information about officers from other inmates.

Relative to L.M, appellant first came in contact with him in the Ancora parking lot when he helped L.M. by jump starting his vehicle. He did not know L.M. or why he was there. Other civilians utilized the lot.

D.M. worked in the kitchen at BSP and not on appellant's detail. Appellant denied bringing baked ziti from L.M. into BSP to D.M.

Appellant next met L.M. at a Home Depot approximately four to five months after meeting him in the Ancora parking lot. Although at that time appellant could not remember where he had met L.M. previously, he eventually recognized where they first met. L.M. provided appellant with help with an electrical project appellant was doing at his house. After several encounters at Home Depot, appellant and L.M. exchanged telephone numbers. L.M. provided advice about the electrical installation by telephone. L.M. helped appellant hook up a breaker panel, electrical box, and drop ceiling lights at his home.

Thereafter, appellant became aware that L.M.'s son was a former inmate. In October 2013, L.M. called appellant and told him D.M. was missing. Appellant believed that maybe L.M. thought he could assist in investigating missing people or cars. L.M. then also called appellant to tell him D.M. had become deceased. L.M. and appellant continued to communicate after D.M.'s death about appellant's electrical project.

Appellant maintained that he was never told he was prohibited from having contact with the family of a former inmate for one year after the inmate left custody.

Relative to his radio and keys, appellant stated that he generally handed off his radio and keys to the incoming officer in the gate shed where the metal detector is located. He did not remember leaving his radio or keys unattended. Standard procedure was to place the items on the table for the next officer. On the date in question, Benvenuti replaced him. Appellant's keys and radio never went missing.

## Credibility

Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's 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 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . 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." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . .

. [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Cmty. Affairs Dep't, 182 N.J. Super. 415, 421 (App. Div. 1981).

After reviewing the evidence, I make the following **FINDINGS of FACT:**

The testimony presented by Soltys and Manera about their investigatory actions, observations of appellant's behavior and statements, and the facts as detailed in Manera's special report were consistent. Collectively, their testimony of the events of the incident and the information they gathered during their investigation made sense and hung together to describe what occurred. It was undisputed that appellant and L.M. engaged in several meetings and numerous, at least thirty, telephone communications during D.M.'s incarceration, his half-way house sentence, and after D.M.'s release and death.

Manera and Ferrari expressed no pre-existing issues with or animosity toward appellant, which made their testimony believable. Although appellant alleged he was labeled a "bad officer" and targeted for discipline after he received treatment for his prescription drug addiction, he failed to produce any competent evidence to support his position. Appellant's allegation alone was insufficient to mar the credibility of Manera and Ferrari.

It further failed to demonstrate that appellant's renditions of the facts were believable. Appellant's statements were inconsistent and contradictory. In this regard, appellant's rendition of the facts surrounding his relationship with L.M. and D.M developed from a denial about knowing L.M. and D.M., until appellant was confronted with evidence to the contrary; to an admission of having met L.M. in the Ancora parking lot while he was there to visit D.M.; to an admission of numerous telephone communications with L.M. beginning while D.M. was incarcerated at BSP; to discussions about how D.M. was fairing

in BSP; to an admission that L.M. materially helped appellant complete electrical construction at his home.

Further, appellant's testimony in this proceeding then contradicted his interview statements, despite stating under oath that both were true. In this regard, appellant denied knowing L.M. and D.M. He knew that L.M. was visiting an inmate, when he met him in the Ancora lot because it was visiting time. He and L.M. had conversations about how D.M. was fairing in BSP. L.M. believed his son's statements that appellant and D.M. were friends and were going to work out together after he was released. However, appellant testified that L.M. provided significant help with his electrical construction, that he did not know why L.M. was in the Ancora parking lot because other members of the public used it, and that D.M. had been already been released when he was communicating with L.M.

In sum, Appellant's statements could not be reconciled to make them consistent or justify his conduct. The other witnesses' renditions of the disputed facts have a greater "ring of truth," than the scenarios offered by appellant, who plainly had a greater interest in the outcome of this proceeding.

I accept Manera's testimony about his investigation, the interviews he conducted and conclusions insofar as it relates to appellant's relationships and conduct with L.M and D.M. and the hand-off of appellant's radio and keys, and other attendant facts. The information regarding L.M and D.M. was supported in the CDW phone records and appellant's own admissions.

Additionally, during his interview, appellant's responses to some questions were articulated clearly and with a strong voice. However, when responding to questions, which related to the crux of the allegations of violative conduct, his relationship with D.M., or L.M., or allegations of lying during the interview, appellant's voice became significantly lower in volume and his responses were mumbled, inarticulate or delayed. He also responded with questions which rephrased the initial inquiry and never quite answered the question that was asked. In nearly every instance, appellant delivered each answer by first hanging his head. Similarly, appellant exhibited the same behavior during his

testimony in this proceeding, especially on cross-examination when he was questioned about telling the truth. This affect undermined his credibility.

Appellant's behavior, and his inconsistent statements and testimony lacked credibility. The discrepancies in appellant's testimony and changing renditions of the facts made appellant's testimony unbelievable.

## FINDINGS OF FACT

After carefully reviewing the exhibits and documentary evidence presented during the hearing, and after having had the opportunity to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following to also be relevant and credible **FACTS** in this matter:

Appellant was assigned to BSP as a Senior Corrections Officer. He had been employed in that capacity since 2001. In 2011, appellant suffered a workplace injury to his shoulder. He was prescribed oxycodone and became addicted to the prescribed medication. Appellant received help from his union and underwent rehabilitation treatment at an inpatient facility.

In or about 2014, appellant was the subject of a criminal investigation. During the criminal investigation, information was provided alleging that on July 16, 2014, appellant had taken an inmate, J.L., outside of the secured perimeter of the Ancora BSP facility to repair his truck and camper. They further advised that appellant had J.L. produce personal items for his family, and that appellant inappropriately shared personal information with J.L.

SID investigated these allegations. BSP had a H07 work detail which was comprised of inmates, who completed maintenance projects inside and outside of BSP. The detail returned to BSP's custody each night, when they were assigned to a project outside BSP. Manera interviewed the inmates assigned to the work detail to determine if they had seen J.L. outside the perimeter with appellant, when their van returned on July

16, 2014. Manera also interviewed six Ancora officers to determine whether they knew about appellant taking J.L. outside the perimeter fence.

Manera conducted a pre-interview conference with J.L. to review the information and questions, which would be included within his interview. During the conference, J.L. provided inaccurate information relative to the dates of the alleged repairs to appellant's vehicles. J.L. was then interviewed to corroborate some of the information and allegations, which had been provided to Manera. During the interview, J.L. corrected the dates he had previously provided.

Manera retrieved appellant's marriage certificate and children's birth certificates from appellant's personnel file. He obtained pictures of appellant's house, vehicle, and camper.

Respondent did not subpoena or produce J.L., the members of the H07 work detail, or the six Ancora officers to testify in this proceeding. No evidence was produced to support J.L.'s or the other witnesses' statements. Respondent failed to locate and subpoena J.L. or the H07 witnesses, who might not have been in DOC custody at the time of this proceeding, to testify. Respondent failed to subpoena or produce the Ancora officers to testify. Appellant did not have the opportunity to cross-examine these witnesses.

On July 16, 2014, appellant was photographed at 21:30 hours as he left the facility after inmate count through the BSP gate shed. Appellant failed to properly hand-off his radio and keys to the officer replacing him on the next shift as required, when he left them unattended on the table next to the metal detector. At 21:40 hours, appellant's radio and keys were still unattended on a table.

Officer Benvenuti replaced appellant on the next shift at 21:42 hours, at which time he retrieved the equipment from the table. Appellant abandoned his radio and keys for twelve minutes, and departed before Benvenuti arrived for the shift change and the required hand-off of equipment. This was appellant's ordinary practice and conduct.

A CDW issued out of Camden County during the criminal investigation for the disclosure of appellant's cellular phone records for the period between March 1, 2013 and September 1, 2014, showed numerous cellular communication between L.M. and D.M. Between September 15, 2013 and September 1, 2014, thirty calls were exchanged between appellant, whose cell phone number ended in X609, and L.M., whose cell phone number ended in X423. Appellant and L.M. had additional communications.

Appellant and L.M. exchanged telephone numbers and had numerous telephone communications and appellant's personal cell phone number was stored in L.M.'s phone under appellant's first name, "Dallas."

On March 28, 2016, a declination to prosecute letter was issued by the Camden County Prosecutor's Office. As a result of that correspondence, appellant's matter was remanded to SID for an administrative investigation.

Appellant was formally interviewed by SID investigators on April 6, 2016, with his union representative present. Appellant was informed and knew that his statements would constitute a formal report and that lying during the questioning would constitute falsifying his report. Appellant's interview statements were inconsistent and contradictory about his knowledge of the events and circumstances, and his contact D.M. and L.M.

In this regard, initially, appellant denied knowing D.M. or L.M. When confronted with the telephone records, appellant only then recalled meeting L.M. in the Ancora parking lot at 2:00 p.m. and giving him a jump start. Appellant stated that he knew L.M. was at Ancora to visit an inmate, because 2:00 p.m. was visiting time.

Despite having denied knowing L.M., appellant and L.M. engaged in at least thirty cellular communications. Appellant met L.M. in Home Depot where L.M. worked multiple times. L.M. provided appellant with the benefit of his experience as a union electrician, and helped appellant install electrical service and fixtures in his home and complete his home improvement project. Appellant received significant benefit from L.M.'s help.

Appellant stated that D.M. worked in the BSP kitchen. However, D.M. was actually assigned to appellant's work detail. Moreover, during their communications and meetings, appellant and L.M. discussed L.M.'s sons who were incarcerated. Appellant and L.M. engaged in "small talk about his son." L.M. asked him, "maybe you seen (sic) him in there. How's he doing?" L.M. and appellant conversed about how D.M. was fairing in Ancora. L.M. provided appellant with a baked ziti, which he took into Ancora for D.M. L.M. believed his son that appellant and D.M. were friends, while D.M. was an inmate in Ancora and afterwards, and that appellant and D.M. were going to work out and get in shape after D.M. was released. Appellant's relationship with L.M. and D.M. began while D.M. was incarcerated at BSP.

D.M. was ultimately released to a DOC half-way house to complete his sentence. Although the date of D.M.'s release to the half-way house is unknown, appellant continued to engage in communication and contact with L.M. during that time. Appellant and L.M. continued their relationship and appellant continued to receive help from L.M. relative to his home improvement project, after D.M. was released from DOC custody. In October 2013, L.M. contacted appellant, because D.M. had gone missing with L.M.'s car. Shortly thereafter, L.M. contacted appellant and told him D.M. had died. Appellant and L.M. continued to communicate after D.M.'s death.

Appellant's relationships with D.M. and L.M. began while D.M. was incarcerated at BSP. Appellant's relationship with L.M. continued after D.M.'s death. Appellant never reported his relationships with L.M or D.M. to his Administrator or employer. These were unduly familiar relationships. Such behavior was unbecoming a corrections officer and violated the public trust.

SID issued a supplemental report, dated April 7, 2016, which recommended actions including continuing the investigation of appellant to allow DOC to review the investigatory information including the video recording of appellant's interview.

Appellant was trained regarding the requirements provided in the Handbook, and Rules and Regulations, and about familiar and consensual relationships and ethics. Appellant acknowledged receipt of these materials and training.

The first PNDA issued on May 13, 2016, related to the allegations surrounding J.L. For these charges a FNDA was issued on August 5, 2016. The second PNDA issued on July 12, 2016, and related to the allegations regarding L.M. and D.M. For these charges a FNDA was issued on August 5, 2016.

## LEGAL ANALYSIS AND CONCLUSIONS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The appointing authority shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Appellant's status as a correction's officer subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). They represent "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." Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of

authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

> 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 properly operated, have a capacity to become "tinderboxes."

Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

**J.L.**

Judicial rules of evidence do not apply to administrative agency proceedings, except for rules of privileges or where required by law. N.J.R.E. 101(a)93); DeBartolomeis v. Bd. of Review, 341 N.J. Super. 80, 82 (App. Div. 2001); N.J.S.A. 52: 14B-10(a); and N.J.A.C. 1:1-15(c).

Hearsay are statements other than ones made by the declarant while testifying at a hearing, offered into evidence to prove the truth of the matter asserted. N.J.R.E. 801(c). Hearsay is usually not admissible because it is deemed untrustworthy and unreliable, (N.J.R.E. 802), unless it falls within an exception set forth in N.J.R.E. 803 or 804. However, hearsay is admissible in an administrative proceeding such as this one subject to the "residuum rule," which mandates that the administrative decision cannot be predicated on hearsay alone. Weston v. State, 60 N.J. 36 (1972).

> [A] fact-finding or legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal competent evidence in the record to support it. Id. at 51.

The Uniform Administrative Procedure Rules governing administrative agency proceedings codify this doctrine by requiring that "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(c). In assessing hearsay evidence, it should be accorded "whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability. N.J.A.C. 1:1-15.5(a).

I accept Manera's testimony about his investigation and interview of J.L. However, J.L.'s demeanor during his interview and rendition of the events lacked a ring of truth that undermined his credibility. J.L. was given a pre-interview conference during which he was provided with the questions to be asked and information about the events about which he was to be questioned. J.L.'s interview statements revealed that he had incorrectly identified the repair date in the pre-interview conference and had to correct himself in the taped interview.

Additionally, appellant's marriage certificate, children's birth certificates, pictures of his residence, or make and color of his vehicle, which were obtained by Manera or retrieved from appellant's personnel file, did not constitute a residuum of competent evidence to support J.L.'s statements. If J.L. knew this information, it could have been overheard from conversations between corrections officers, gathered from documents J.L. or others obtained from the internet and public documents, or obtained in other ways. The nexus between those records, and the substance of J.L.'s statements including his alleged relationship with appellant, as presented in this proceeding, was too tenuous to deem his statements credible and reliable. The personal documents retrieved from appellant's personnel file did not support the position that appellant gave that information to J.L., that appellant took J.L. outside the facility's secured perimeter, or that J.L. worked on appellant's vehicles. This rendered the substance of his statements and information unsubstantiated.

No residuum of competent evidence existed to give credibility to or support J.L.'s hearsay statements. No photographs of appellant taking J.L. outside of the secured

perimeter gate to the parking lot were introduced. No document was produced supporting J.L.'s allegations. No corroborating witness was produced to testify. I **CONCLUDE** that J.L.'s statements were hearsay.

Therefore, I exclude Manera's testimony about the facts he gathered and conclusions he made, which related to J.L. and the attendant circumstances. I reject the credibility and reliability of J.L.'s statements and the information provided by him in his interview. As it specifically and only relates to facts and circumstances alleged to involve J.L., I **CONCLUDE** that the investigation's findings and conclusions, and J.L.'s statements were hearsay and not supported by a residuum of competent evidence.

Furthermore, N.J.R.E. 804 provides in pertinent part as follows:

> (a) Definition of unavailable. Except when the declarant's unavailability has been procured or wrongfully caused by the proponent of declarant's statement for the purpose of preventing declarant from attending or testifying, a declarant is "unavailable" as a witness if declarant:
>
> ***
>
> (4) is absent from the hearing because of physical or mental illness or infirmity, or other cause, and the proponent of the statement is unable by process or other reasonable means to procure the declarant's attendance at trial...

In civil cases, where the use of out of court statements does not trigger the Sixth Amendment's Confrontation Clause protections, determining whether a party used "reasonable means" to locate a declarant is a decidedly fact sensitive inquiry, which is generally left to the trial court's sound discretion. Rodriguez v. Hayman, 2013 WL 1222644, 2 (2013). The Rodriguez court found that the touchstones of "reasonable means" under N.J.R.E. 804(a)(5) are variation and repetition, which require various methods for finding the witness, and then, employing some or all of those methods recurrently. Ibid. While the circumstances will vary with each case, a party seeking to show that a declarant is unavailable under Rule 804(a)(5) should generally demonstrate two things. First, that it fashioned a multifaceted approach to locate the declarant.

Second, that it implemented each of these methods more than once, unless it was clear at the time that repetition of any one method would have proven futile. Ibid.

Despite the fact that Manera spoke with the H07 detail and a confidential informant who stated that appellant took J.L. out of the facility to work on his personal vehicle, no such witness testified in this proceeding.[9] The recordation of those statements in Manera's report alone did not constitute a residuum of competent evidence sufficient to warrant the hearsay being admitted, and was insufficient to substantiate the charges stemming from those allegations.

Respondent failed to demonstrate that J.L., or any other member of the H07 team, was an unavailable witness. Whether J.L. was still in DOC custody, such that his production could have been compelled, is not the issue, as suggested by respondent. If J.L. was no longer in DOC custody, then he could have been located and subpoenaed to testify. Respondent advised that J.L. was not subpoenaed. Respondent failed to produce any information about whether it attempted by any means to locate or produce J.L. to testify in this proceeding. These attempts, if any, were unreasonable. No fact or evidence was produced which demonstrated J.L.'s unavailability. Therefore, I do **NOT FIND** that J.L. was unavailable to testify. Since no residuum of competent evidence was produced to substantiate J.L.'s statements and appellant was denied the opportunity to cross-examine the witness, J.L.'s statements are excluded.

Similarly, I do **NOT FIND** that any of the H07 members or officers related to the J.L. facts and events or identified in Manera's report, (see footnote 9 herein), were unavailable to testify. Again, respondent failed to utilize reasonable means to locate and attempt to produce each of them to testify in this proceeding. Their statements recorded in Manera's report are hearsay that lack any residuum of competent evidence to support them. Accordingly, their statements are also excluded.

[9] Manera also interviewed six Ancora Officers relative to the J.L. allegations. "All gave statements that they had no knowledge of SCO Newman bringing inmate [J.L.] outside the secure perimeter to work on his camper." (R-24.)

Based on the foregoing, respondent failed to satisfy its burden to substantiate the charges brought against appellant based on the information related to J.L. Therefore, I **CONCLUDE** that the respondent has failed to present competent evidence to satisfy its burden and substantiate the charges provided for in the first FNDA. I **CONCLUDE** that the charges brought in the FDNA dated August 5, 2016, for violations of N.J.S.A 52:13D-23 Uniform Ethics Code; N.J.A.C. 4A:2-2.3(a)(6) conduct unbecoming an employee; and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11), specifically violations of Human Resource Bulletin (HRB) 84-17, as amended; C(11), conduct unbecoming an employee; E(1) Violation of a rule, regulation, policy, procedure order or administrative decision; and E(2) intentional use or misuse of authority or position are **DISMISSED.**

**45-day Rule**

Appellant argued in his summation that the charges must be dismissed under the auspices of the 45-day rule because respondent failed to bring the disciplinary charges within the time constraints set forth under N.J.S.A. 30:4-3.11a.

N.J.S.A. 30:4-3.11a provides as follows:

> A person shall not be removed from employment or a position as a State corrections officer, or suspended, fined or reduced in rank for a violation of the internal rules and regulations established for the conduct of employees of the Department of Corrections, unless a complaint charging a violation of those rules and regulations is filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. A failure to comply with this section shall require a dismissal of the complaint. The 45-day time limit shall not apply if an investigation of a State corrections officer for a violation of the internal rules and regulations of the Department of Corrections is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State; the 45-day limit shall begin on the day after the disposition of the criminal investigation. The 45-day requirement in this section for the filing of a complaint against a State corrections officer shall not apply to a filing of a complaint by a private individual.

In the first instance, appellant alleged that the Camden County Prosecutor Office's declination letter was received by DOC on March 28, 2016, and therefore, respondent had to file its charges on or before May 12, 2016. Appellant acknowledged that the earliest PDNA is dated May 13, 2016; however, appellant claims this is one day beyond the statutory limit.

In the second instance, appellant alleged that the only charge which post-dated the March 28, 2016, declination letter related to appellant lying about an unduly familiar relationship with an inmate and his father. Appellant reasoned that since Manera's supplemental report was dated April 7, 2016, the statutory limit for bringing that charge was May 22, 2016. Appellant submitted that this charge was filed on July 12, 2016, which was forty-six days too late.

Relative to the first PNDA, dated May 13, 2016, and the corresponding FNDA, dated August 5, 2016, the issue is moot because those charges have been dismissed for the reasons set forth above.

Relative to the second PNDA, dated July 12, 2016, as a result of the Camden County Prosecutor's Office's declination letter, dated March 28, 2016, the internal affairs investigation changed from criminal to administrative. Appellant's matter was remanded to SID for further investigation.

SID interviewed the appellant on April 6, 2016. In a report, provided to departmental authorities for review, dated April 7, 2017, appellant's interview was summarized. The report specifically stated as follows:

> It should also be noted, all of the aforementioned statements from the video recoded (sic) interview are a synopsis of the video recording. These statements are not a transcript and further information may be obtained by reviewing the video recording.

N.J.S.A. 30:4-3.11(a) did not preclude respondent from completing its investigation, reviewing the video or any other evidence or statements gathered in the criminal and administrative portions of the investigation, before bringing all charges against appellant. The date of the supplemental report is not controlling to commence the running of the forty-five day period. Transmission of that report and the statements contained therein indicate that the investigation was ongoing. The report and the other referenced investigatory information, had to be reviewed by departmental authorities.

Additionally, appellant did not suffer prejudice because the charges were filed on July 12, 2016. Appellant's argument to the contrary that the approximate two-year period between the incidents on July 16, 2014, and the date of the local hearing damaged appellant's ability to remember the events and defend against the charges is without merit. The ability to bring charges against appellant was tolled during the nearly two-year criminal investigation. Appellant was accompanied by his union representative during his interview. He was provided with his Weingarten Rights. He understood the events and circumstances about which he was being questioned. He understood the investigation was ongoing.

I **CONCLUDE** the second charges were timely brought on July 12, 2016.

**N.J.A.C. 4A:2-2.3(a)(6)**

Appellant was charged with "conduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase that 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 Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. 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, 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)).

The basis for the charge of conduct unbecoming a public employee was appellant's unduly familiar and inappropriate relationship with L.M. and D.M. and that appellant lied during his internal affairs interview by changing his rendition of the facts relating to L.M. and D.M. multiple times. Appellant engaged in a relationship with D.M. while he was incarcerated at BSP and thereafter, until the date of his death. Appellant engaged in a relationship with L.M. while D.M. was incarcerated at BSP. Appellant became unduly familiar with L.M. and D.M. Appellant took food from L.M. to D.M. while D.M. was in BSP. In return, appellant exchanged the access to D.M., which his position as an SCO provided, for receipt of electrical contracting expertise and help with his home improvement project. Appellant received benefit from his relationship with the father of an inmate during the inmate's incarceration, term in a half-way house, and within one year of the inmate's release from DOC custody. This conduct compromised appellant.

Moreover, appellant repeatedly lied by making false and contradictory statements to investigators, during his internal affairs interview. Appellant's rendition of the facts surrounding his relationship with L.M. and D.M developed from a denial about knowing L.M. and D.M., until appellant was confronted with evidence to the contrary; to an admission of having met L.M. in the Ancora parking lot, while he was there to visit D.M.; to an admission of numerous telephone communications and meetings with L.M. beginning while D.M. was incarcerated at BSP; to discussions about how D.M. was fairing in BSP; to an admission that L.M. materially helped appellant complete electrical construction at his home.

Further, appellant's testimony in this proceeding then contradicted his interview statements, despite his stating under oath that both were true. In this regard, appellant denied knowing L.M. and D.M. He knew that L.M. was visiting an inmate, when he met him in the Ancora lot because it was visiting time. He and L.M. had conversations about how D.M. was fairing in BSP. L.M. believed his son's statements that appellant and D.M. were friends and were going to work out together after he was released. However,

appellant testified that L.M. provided significant help with his electrical construction, that he did not know why L.M. was in the Ancora parking lot because other members of the public used it, and that D.M. had been already been released when he was communicating with L.M. Appellant's statements could not be reconciled to make them consistent or justify his conduct. Simply put, appellant lied about the relationship and his contact with L.M. and D.M. in his interview.

As a corrections officer, appellant was held to a higher standard of conduct. The public respects officers for discovering, reporting, and championing the truth in circumstances of wrongdoing and while they are satisfying their duties. Appellant's conduct in these unduly familiar relationships and his lies to investigators adversely affected the morale or efficiency of a governmental unit and would tend to destroy public respect in the delivery of governmental services. Appellant's actions were violative of his obligations in a position of public trust. It offended publicly accepted standards of respect and decency.

No circumstances existed to warrant or justify appellant's deceitful conduct. Moreover, no circumstances existed justifying his relationship with L.M. or D.M. Those unduly familiar relationships existed while D.M. was incarcerated in BSP, while D.M. was serving his sentence in a DOC half-way house, and during the year after.

Therefore, I **CONCLUDE** that appellant's behavior did rise to a level of conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6). I **CONCLUDE** that respondent has met its burden of proof on this issue.

Appellant has also been charged with violating of Human Resource Bulletin (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; C(11), conduct unbecoming an employee; D(4) improper or unauthorized contact with inmate-undue familiarity with inmates, parolees, their families or friends; D(6a) loss or careless control of keys, pager/beepers or cellular phones; D(6b) loss or careless control of radios, mace, or handcuffs; E(1) violation of rule, regulation, policy, procedure, order or administrative decision

**Human Resource Bulletin (HRB) 84-17**

HRB 84-17, as amended, provides in pertinent part as follows:

> In any disciplinary matter, reference must always be made to the collective bargaining agreement covering the disciplined employee, relevant Department of Personnel Rules, appropriate Department bulletins or memoranda, the Handbook of Information and Rules for Employees of New Jersey Department of Corrections, and/or the Law Enforcement Personnel Rules and Regulations.

**C(8) Falsification: Intentional misstatement of material fact in connection with work, employment application, attendance or in any record, report, investigation or other proceeding.**

Appellant was advised that his recorded interview statement would serve as his official statement and that by not telling the truth he would be falsifying his report. Despite this warning, appellant lied and otherwise intentionally misstated facts repeatedly during his internal affairs interview relative to his relationship with L.M. and D.M.

In the Law Enforcement Personnel Rules and Regulations, Article III, Section 4 requires an Officer to, "report all prior relationships with inmates or parolees in writing to the Administrator or his designee." Appellant never reported his relationship with L.M. or D.M. I **CONCLUDE** this omission was an intentional misstatement of fact meant to conceal his relationships.

Appellant contradicted himself numerous times during his interview. Appellant's rendition of the facts surrounding his relationship with L.M. and D.M developed from a denial of knowing them, until appellant was confronted with evidence to the contrary; to an admission of numerous telephone communications with L.M.; to an admission that L.M. materially helped appellant complete electrical construction at his home. Further, appellant's testimony in this proceeding then contradicted this his SID interview statements. Appellant's statements could not be reconciled to make them consistent or

justify his conduct. Simply put, appellant lied about the relationship and his contact with L.M. and D.M. Therefore, I **CONCLUDE** respondent has met its burden of proof on this issue. I **CONCLUDE** that appellant's conduct violated C(8) by falsifying and intentionally misstating facts in connection with work, the SID investigation, and his statement which under the circumstances presented herein served as his report.

**C(11) Conduct Unbecoming an Employee; and D(4) Improper or Unauthorized Contact with Inmate-Undue Familiarity with Inmates, Parolees, Their Families or Friends**

General Principles, Subsection C of the Handbook of Information and Rules for Employees of the New Jersey DOC provides that employees are prevented from, "becoming unduly familiar with any inmate or group of inmates or permit[ting] himself to become obligated in any way to an inmate or his family; a parolee or his family." General Rules and Regulations, Subsection K provides that "employees must not give or receive from any inmate or parolee or any inmate or parolee's friend, relative, or representative anything in the nature of a gift or promise or favor, however trivial."

Furthermore, the Law Enforcement Personnel Rules and Regulations provides in pertinent part Article III, Subsection 4 provides that "no officer shall become unduly familiar with inmates who are incarcerated, on community release, or on parole status, within one year of the completion or vacating of all court imposed sentences or while the former inmate is under any form of criminal justice jurisdiction. An officer shall report all prior relationships with inmates or parolees in writing to the Administrator or his designee."

Appellant was required to follow both the Handbook Rules and the Law Enforcement Rules. The two policies must be read together and supplement each other. The purpose of the policies is consistent. It is to prevent officers from being compromised or becoming obligated to inmates, their friends, or families. These unduly familiar relationships compromise officers, the facility, inmates, and the public. They are an avenue to corruption.

Appellant's relationship with L.M. began while D.M. was incarcerated in BSP. Appellant conversed with L.M. about D.M. and how he was fairing in BSP. Appellant took baked ziti from L.M. to D.M. in BSP. Appellant received a benefit and favor from L.M. when he received electrical construction help and advice from L.M. which permitted him to complete the construction at his house. This was an unduly familiar relationship. Such behavior is unbecoming a corrections officer and violates the public trust.

Therefore, I **CONCLUDE** respondent has met its burden of proof on this issue. I **CONCLUDE** that appellant's conduct violated D(4), improper or unauthorized contact with an inmate and undue familiarity with inmates, parolees, their family or friends by engaging in a relationship with L.M. and D.M. I **CONCLUDE** that appellant's actions violated C(11), conduct unbecoming and employee by engaging in an unduly familiar relationship with an inmate and his family for which appellant exchanged his access and ability to aid or favor an inmate to receive a benefit.

**D(6a) loss or careless control of keys, pager/beepers or cellular phones; D(6b) Loss or Careless Control of Radios, Mace, or Handcuffs; and E(1) Violation of Rule, Regulation, Policy, Procedure, Order or Administrative Decision**

IMO 400 General Duties, Subsection 17 required that "as the officer being relieved it is your responsibility to pass on all necessary equipment, keys, and information to the oncoming officer." The purpose of this policy is to prevent the officer's radio, keys, cuffs and other required uniform tools from becoming lost, or finding their way to the inmates and becoming contraband. On July 16, 2014, appellant left his shift at 21:30 hours through the metal detector in the gate shed. He placed his keys and radio on the table and left BSP. Appellant's keys and radio were left unattended for twelve minutes. They were then retrieved by the next shift's officer. Appellant did not hand-off the equipment to the next officer as required. His actions were insufficient to satisfy the pass-on requirement. Once appellant left his radio and keys on the table he lost control over them or carelessly controlled them.

Appellant admitted that his practice was place his keys and radio on the table next to the metal detector and leave. Appellant's "no harm, no foul" justification that his keys,

cuffs and radio never went missing as a result of this practice was without merit. The fact that a consequence did not occur is insufficient reason to permit appellant to violate the rules, regulations, and policies. Appellant failed to abide by rules, procedures and orders by abandoning a radio and keys on a table.

Therefore, I **CONCLUDE** respondent has met its burden of proof on this issue. I **CONCLUDE** that appellant's conduct violated D(6a) by losing and carelessly controlling his keys. I **CONCLUDE** that appellant's conduct violated D(6b) by losing control of his radio and keys. I **CONCLUDE** that appellant's conduct violated E(1) by failing to abide by these rules, procedures and orders by abandoning his keys and radio.

**N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause**

Finally, appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. As detailed above, appellant's conduct was such that he violated this standard of good behavior. As such, I **CONCLUDE** that the respondent has met its burden of proof on this issue. I **CONCLUDE** that appellant's actions violated N.J.A.C. 4A:2-2.3(a)(12).

## PENALTY

The next question is the appropriate level of that discipline. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number, and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

The law is also clear that a single incident can be egregious enough to warrant removal without reliance on progressive-discipline policies. See, In re Herrmann, 192 N.J. 19, 33 (2007) (Division of Youth and Family Services worker who snapped lighter in front of five-year-old), in which the Court stated:

> ". . . 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).

In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522–24. Major discipline may include removal, disciplinary demotion, or a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

Respondent argued that appellant knowingly and intentionally engaged in unduly familiar relationships with D.M. and his father, L.M., while D.M. was an inmate at BSP, was serving his sentence in a DOC half-way house, and after D.M. was released. Appellant continued this relationship with L.M. after D.M.'s death. Respondent further argued that appellant lied about these inappropriate relationships during his SID interview; thus, falsifying his report. Respondent also argued that appellant violated safety and security rules, orders and procedures, when he lost control over his keys and radio. Respondent submitted that appellant's conduct placed appellant, inmates, the public and the BSP facility at risk.

Appellant argued that after he suffered a work place injury in 2011 he became addicted to his prescription medication and sought treatment, he was labeled a "bad employee," and targeted for discipline. Prior to that date, and throughout his first eleven years of his employment he had no significant disciplinary problems. To terminate him would be harsh, excessive, and flies in the face of progressive discipline.

There is no question that appellant had few disciplinary issues prior to the events of July 16, 2014. In this regard, appellant had an official reprimand for attendance and unexcused lateness in 2001, and a one-day suspension for negligent actions relating to property, which was a violation of safety and security precautions, in 2003. Thereafter, in 2006, 2007, and 2011, appellant received commendations.

Unfortunately, appellant's actions in engaging in unduly familiar relationships with D.M. and L.M., through which appellant received personal and significant benefit, and became obligated to D.M. and L.M., violated the public trust and put the safety of the inmates, the facility, DOC, and the public at risk. This was compounded by his blatant lying in his formal interview. His cavalier attitude about his practice of abandoning his keys and radio, his loss of control over his equipment, and his omission to report his relationship with L.M or D.M., was indicative of his behavior. Moreover, his morphing rendition of the facts was an intentional attempt to conceal his actions and attempt to limit his liability. Appellant's actions consistently showed that he believed he was above the rules. Such conduct placed not only the public, but the DOC at risk.

Accordingly, I **CONCLUDE** that removal is the appropriate discipline for the violations of N.J.A.C. 4A:2-2.3(a)(6) conduct unbecoming an employee; and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11), specifically violations of Human Resource Bulletin (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; C(11), conduct unbecoming an employee; D(4) improper or unauthorized contact with inmate-undue familiarity with inmates, parolees, their families or friends; D(6a) loss or careless control of keys, pager/beepers or cellular

phones; D(6b) loss or careless control of radios, mace, or handcuffs; and E(1) violation of rule, regulation, policy, procedure, order or administrative decision be **AFFIRMED**.

## ORDER

Accordingly, it is **ORDERED** that the disciplinary action entered in the second Final Notice of Disciplinary Action, dated August 5, 2016, (R-2), of the Bayside State Prison, Department of Corrections, against appellant, Dallas Newman, is hereby **AFFIRMED**.

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

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

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

April 18, 2018
DATE

**DOROTHY INCARVITO-GARRABRANT**, ALJ

Date Received at Agency: 4/18/18

Date Mailed to Parties: 4/18/18.

tat/lam

## APPENDIX

## LIST OF WITNESSES

**For Appellant:**

Dallas Newman, Appellant

**For Respondent:**

Edward Soltys, Investigator
Stephen Manera, Retired Investigator
Albert Ferrari, Lieutenant

## LIST OF EXHIBITS

**For Respondent:**

R-1 PNDA (non-ethics), dated 7/12/16
R-2 FNDA (non-ethics), dated 8/5/16
R-3 PNDA (ethics), dated 5/13/16
R-4 FNDA (ethics), dated 8/5/16
R-5 HRB 84-17, as amended
R-6 IMP Level III 400
R-7 Handbook of Information and Rules for Employee of N.J. DOC
R-8 Law Enforcement Personnel Rules and Regulations
R-9 Policy Receipt Form Staff/Inmate Over-Familiarity Policy
R-10 Receipt for Law Enforcement Personnel Rules and Regulations
R-11 Annual Ethics Briefing Form
R-12 Receipt Form Mandatory Annual Ethics Briefing
R-13 Receipt Form- Prohibition of Personally Owned Electronic Communication Devices within Designated Areas of NJDOC Correctional Facilities
R-14 Policy Receipt Form Code of Ethics

R-15 Policy Receipt Form Familial and Consensual Personal Relationships Policy

R-16 Performance Assessment Review with Job Expectations and Evaluations

R-17 Marriage Certificate

R-18 Birth Certificate for T.R. Newman

R-19 Birth Certificate for L.V. Newman

R-20 Custody Orientation Checklist

R-21 DOC Interview Questionnaire

R-22 Removed by respondent

R-23 SCO Boaggio's Report

R-24 Manera's Report

R-25 Manera's Supplemental Report

R-26 Weingarten Rights

R-27 Interview with SCO Newman

R28A- through

R28J Photographs of Metal Detector

R-29 Camper Photograph

R-30 Truck Photograph

R-31 Settlement Agreement Progressive Discipline

R-32 FNDA 31-B Specification

R-33 Weingarten Rights

R-34 Cover Sheet for Phone Records

R-35 Subpoena for Phone Records

R-36 CDW

R-37 Authorization for CDW from Camden County

R-38 CDW Affidavit

R-39 Cover Sheet with Notes

R-40 Phone Records

R-41 L.T. Orsini's Report

R-42 Major Redman' Report

R-43 Special Custody Report

R-44 DVD Interview with Newman

R-45 CD- audio interview with L.M.

R-46 Interview with J.L.

R-47 Verizon Phone Key

**For Appellant:**

None