

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 5TH DAY OF SEPTEMBER, 2018



Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DKT. NO. CSR 07100-18 (ON Remand
CSR 16796-17)

AGENCY REF. NO. 2018-1234

**IN THE MATTER OF ERIC WARREN,
BURLINGTON COUNTY JAIL.**

Daniel M. Rosenberg, Esq., for appellant Eric Warren (Daniel M. Rosenberg & Associates, LLC, attorneys)

Andrew C. Rimol, Esq., for respondent Burlington County Jail (Capehart Scatchard, P.A., attorneys)

Record Closed: June 8, 2018

Decided: July 23, 2018

BEFORE **JOSEPH A. ASCIONE, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Eric Warren (appellant) appeals from the decision of the Burlington County Jail (BCJ) to remove him from his position as a correction officer at the BCJ on charges of violation of N.J.A.C. 4A:2-2.3(a)(1), (3), (6), (7), and (12), incompetency, inefficiency or failure to perform duties, inability to perform duties, conduct unbecoming a public employee, neglect of duty, and other sufficient cause, relating to the failure to conduct ten required general security checks during his shift commencing at 18:00 hours on July

2, 2017, and terminating at 06:00 hours on July 3, 2017, and the improper entry in the logbook of ten security tours during that shift. Additional charges include violation of Policy & Procedure Manual Sections 1007, 1023, 1030, 1031, 1038, 1065, 1066, 1172, 1190, and 1250. Appellant does not deny the charges. Appellant asserts that removal is not the appropriate sanction.

On September 7, 2017, a Preliminary Notice of Disciplinary Action was filed seeking appellant's removal. The appellant requested a departmental hearing, which was held on September 21, 2017. On October 19, 2017, a Final Notice of Disciplinary Action was issued, sustaining the disciplinary charges and removing appellant from his position with the BCJ effective October 16, 2017. Appellant appealed that removal action under cover letter dated October 31, 2017. The matter was filed simultaneously with the Civil Service Commission and the Office of Administrative Law (OAL), under the expedited procedures of P.L. 2009, c. 16, N.J.S.A. 40A:14-202(d), where it was stamped received on November 2, 2017, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On November 30, 2017, the matter was assigned to me. On December 6, 2017, I convened a telephonic case-management conference to discuss discovery requirements and schedule the evidentiary hearing. The hearing was scheduled for January 26 and January 31, 2018. Appellant requested an adjournment of the January 26, 2018, hearing date. On January 31, 2018, the hearing was held. At the hearing, appellant waived his right to reinstitute pay under N.J.S.A. 40A:14-201 et seq., until April 2, 2018. A separate Order regarding salary is being issued simultaneously with this Initial Decision. At the close of the plenary hearing, counsel for both sides presented written closing statements and briefs. The record closed on January 31, 2018 and an initial Decision was rendered on July 23, 2018.

On May 4, 2018, the Civil Service Commission remanded the matter to the OAL, for the entry into the record of the appellant's disciplinary record. After receipt of the appellant's disciplinary record, the record in this matter closed on June 8, 2018.

FACTUAL DISCUSSION

Administrative Captain Matthew Leith was precluded by the tribunal from testifying at the initial hearing regarding the prior disciplinary matters. The parties at the initial hearing represented to the tribunal that the prior disciplinary matters were not significantly related to the violations charged, and the prior disciplinary record was not sought to be introduced under seal pending the ALJ's determination of the violations and penalty. It is the ALJ's practice to avoid the appearance of improperly considering the prior disciplinary matters to determine the violations, and only consider them after the violations have been found and the penalty imposed.

As the order of remand requested the prior disciplinary history for completeness. The ALJ requested the prior disciplinary history from the respondent. Appellant made no objection to accepting the history as an exhibit and the ALJ accepted it into evidence on June 8, 2018, as J-13. No additional hearing was scheduled to allow the respondent to address that history. Appellant reserved the right to file additional exceptions to the ID on Remand, which is granted.

Based upon the submission of the respondent of the prior disciplinary history without objection, **I FIND AS FACT** that J-13 is the prior disciplinary history of the appellant.

ANALYSIS AND CONCLUSIONS OF LAW

The introduction of the prior disciplinary history, does not alter the initial decision issued in this matter. The previous analysis and conclusions of law are incorporated herein by reference.

ORDER

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action against appellant Eric Warren 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. 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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 23, 2018

DATE

Joseph A. Ascione

JOSEPH A. ASCIONE, ALJ

Date Received at Agency:

7/23/18

7/23/18

Mailed to Parties:

/lam

APPENDIX

LIST OF WITNESSES

For Appellant:

None

For Respondent:

None

LIST OF EXHIBITS IN EVIDENCE

Joint:

J-13 Employee Discipline History

For Appellant:

None

For Respondent:

None

In his initial decision, the ALJ found that the appellant did not dispute that he violated departmental policies. The ALJ noted that although the appellant did not testify, one witness confirmed that a County Correction Sergeant "may have acted similarly" in misreporting security checks, but had not been disciplined. Specifically, the appointing authority indicated that it was too late to discipline that County Correction Sergeant, but that six individuals, including the appellant, had been identified as having committed similar violations. The appointing authority further noted that none of the six identified employees were currently employed by the appointing authority. As the appellant essentially admitted to the infractions, the ALJ upheld the charges.

With regard to the issue of the penalty, the ALJ noted that the appellant's disciplinary history was not made part of the record, as "such history reflected attendance or lateness issues, which would be of slight values to either positively or negatively affect the determination of the issue of penalty" in the instant matter. The ALJ found that the appellant had failed to establish that the charges against him were the result of disparate treatment, as the exercise of some selectivity in enforcement is not an issue unless it was based on an improper reason. The ALJ found that the appellant's failure to perform security checks and his falsification of records was egregious misconduct and warranted removal.

In his exceptions, the appellant argues that the Supreme Court and Appellate Court's decisions in *In the Matter of John E. Warren and Gerald Sowa*, 117 N.J. 295 (1989), *In the Matter of Nolan Cox*, Docket No. A-2471-14T4 (App. Div. Dec. 7, 2016) and *In the Matter of Ramona Carter*, Docket No. A-3105-14T4 (App. Div. March 7, 2017) establish that the removal is an excessive penalty for the charges alleged. In this regard, he maintains that although his conduct was negligent, it did not warrant removal.

In its reply to the exceptions, the appointing authority argues that the appellant's actions were particularly egregious as he knew he was required to perform a security check every 30 minutes, he failed to perform 10 of those required checks and that 10 of his 15 logbook entries corresponding to the security checks were knowingly false. Moreover, it argues that the decisions cited by the appellant do not support his assertion that removal is not an appropriate penalty. Furthermore, it notes that the appellant was a sworn law enforcement officer that knowingly and willfully made false entries into an official logbook to cover up his misconduct in not completing the required security tours.

Upon its *de novo* review of the record, the Commission agrees with the ALJ's findings to uphold the charges. However, with regard to the issue of the penalty, the Commission finds it necessary to remand this matter to the OAL. In this regard, the Commission notes that although the ALJ references a disciplinary history, he decided not to admit that history into the record. However, the

Commission notes that even when there is no dispute as to the charges, and an ALJ has determined that the claimed behavior was egregious, the disciplinary history must be admitted into the record to allow the Commission to have a complete record so that it may make its decision. In this regard, it cannot be assumed that the Commission, which has *de novo* review of both the underlying charges and the penalty imposed, will automatically agree with an ALJ's conclusions as to the severity of the misconduct or the penalty determination. Thus, an appellant's prior disciplinary history may provide the Commission with a more complete record for it to determine the appropriate penalty. Further, while the ALJ noted that the appellant's prior disciplinary history was apparently for dissimilar conduct, that, in and of itself, does not mean that such a history cannot be considered in determining the proper penalty.¹ The Commission notes that the inclusion of an appellant's disciplinary history is **essential**, even in matters where the Commission ultimately agrees with an ALJ's assessment of the severity of the misconduct or determines that the alleged misconduct is so egregious that the penalty imposed is appropriate even without regard for that history. This is the case, since, if the Commission does not agree, it is left without a critical piece of information in the record which will hamper its ability to impose a proper penalty. Moreover, notwithstanding the appellant's admission of the conduct, one witness did give testimony. However, the ALJ failed to summarize that witness' testimony. Therefore, the Commission remands the matter to the OAL so that the appellant's disciplinary record may be entered into the record, the witness' testimony may be summarized and a new initial decision may be issued.

ORDER

The Commission orders that this matter be remanded to the Office of Administrative Law for further proceedings as set forth above.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

¹ Of course, the Commission agrees with the ALJ that any disciplinary history may be ignored when the misconduct is of such an egregious nature that removal may be imposed regardless of an employee's history. However, it does not agree that the history should, therefore, not be included as part of the underlying record.