

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 29th DAY OF APRIL, 2020



Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 19494-15

AGENCY DKT. NO. 2015-1515

**IN THE MATTER OF JOSEPH CONNORS,
CAMDEN COUNTY, DEPARTMENT OF CORRECTIONS.**

Jacqueline M. Vigilante, Esq., for appellant (the Vigilante Law Firm, P.C., attorneys)

**Antonieta P. Rinaldi, Assistant County Counsel, for respondent Camden County
Department of Corrections (Christopher A. Orlando, County Counsel)**

Record Closed: September 6, 2018

Decided: March 3, 2020

BEFORE ELIA A. PELIOS, ALJ:

STATEMENT OF THE CASE

In this matter, appellant Joseph Connors (Connors) challenges his demotion from lieutenant to corrections officer by respondent Camden County Department of Corrections (Department) for engaging in inappropriate text message and photograph exchanges with a subordinate officer, and for failing to report correction officers whom he knew or should have known were improperly using personal cell phones or sleeping while on duty.

PROCEDURAL HISTORY

On February 6, 2015, the Department issued a preliminary notice of disciplinary action (PNDA) setting forth charges and specifications against Connors. On October 2, 2015, following a departmental hearing, the Department issued a final notice of disciplinary action (FNDA) sustaining the charges set forth in the PNDA, and demoted Connors from county correction lieutenant to county correction officer, or corrections officer, effective September 30, 2015.¹ Connors appealed his demotion to the Civil Service Commission (Commission), which filed the matter at the Office of Administrative Law (OAL) on November 30, 2015, for a contested case hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was heard on March 2, 2017, March 23, 2017, October 17, 2017, and October 19, 2017.² As part of this matter, Connors has filed motions to exclude certain exhibits from evidence. The record was held open to allow the parties to submit closing briefs and was closed on September 6, 2018.

FACTUAL DISCUSSION

Connors began his employment with the Department as a corrections officer in 1998. He was promoted to sergeant in December 2005 and attained the rank of lieutenant in February 2013. His disciplinary history includes several reprimands, and a thirty-day suspension for neglect of duty in August 2015.³ (R-15).

¹ Pursuant to P.L. 2019, c. 219 (effective December 1, 2019), the titles "county correction officer" and "county correction lieutenant" were retitled to "county correctional police officer" and "county correctional police lieutenant." For ease of reference, the titles "corrections officer" and "lieutenant" will be used throughout this decision.

² The March 2, 2017 hearing was adjourned early after multiple power outages disrupted the proceedings. On March 23, 2017 the proceedings were interrupted by a failure of the recording system. Several months passed before it was able to be determined that the March 23, 2017 proceedings were lost but that the March 2, 2017 proceedings were able to be recovered. The March 23, 2017 testimony of Lieutenant Harry Sweeten proceeded after the failure with the consent of the parties and was captured by handheld recording device and preserved.

³ In *In re Connors*, 2019 N.J. CSC LEXIS 28 (Jan. 16, 2019), the Civil Service Commission upheld Connors' thirty-day suspension on appeal.

As part of a departmental investigation into former Camden County corrections officer, Michael Jacob (Jacob) and others for smuggling cell phones into the Camden County Correctional Facility (CCCF), the Department confiscated Jacob's personal cell phone on December 30, 2014, and sent it to the Camden County Prosecutor's Office (CCPO) for data extraction. The extraction report revealed that Jacob had exchanged 142 text messages with Connors between April 16, 2014, and December 30, 2014. (R-3).

Because the extraction report indicated that Jacob sent some of the text messages to Connors while Jacob was at work, the Department's Internal Affairs Unit interviewed Connors about his knowledge of Jacob's impermissible cell phone possession and use in the Department's facilities. The interview was conducted by then Captain Christopher Foschini (Foschini) on February 5, 2015. (R-2).

After the interview, Foschini issued a report recommending disciplinary charges against Connors. Ibid. Foschini found that Jacob had repeatedly texted Connors from inside the CCCF or while on duty at various hospitals where inmates received medical treatment; that Connors knew that, due to security reasons, Department policy forbids correction officers from bringing personal cell phones into the jail or hospitals, but that Connors nonetheless allowed his subordinates to use cell phones while on hospital duty; that the cell phone exchanges between Jacob and Connors included pictures of other officers sleeping or wearing earphones while on duty and inappropriate comments about other officers; and that Connors "admitted that he failed to take any action when he saw these clear violations of departmental policies." Ibid.

On February 6, 2015, the Department issued Connors a PNDA demoting him from lieutenant to corrections officer. (R-1). The Department charged Connors with incompetency, inefficiency, or failure to perform duties (N.J.A.C. 4A:2-2.3(a)(1)); conduct unbecoming a public employee (N.J.A.C. 4A:2-2.3(a)(6)); neglect of duty (N.J.A.C. 4A:2-2.3(a)(7)); and other sufficient cause (N.J.A.C. 4A:2-2.3(a)(12)) for violating the Department's rules of conduct and general orders.

Specifically, the Department charged Connors with violations of the following rules of conduct: Rule of Conduct 1.1 – Violations (In General) (subjecting employees to discipline for violating any rule, regulation, procedure, order or directive); 1.2 – Unbecoming Conduct (providing that “[a]ll personnel are required to conduct themselves both on and off duty in such a manner as to reflect favorably on the department,” and includes such conduct “which impairs the operation or efficiency of the department or the employee”); 1.3 – Neglect of Duty (stating that “[a]ny act of omission or commission indicating the failure to perform . . . any rule, regulation, directive, order, or standard operating procedure . . . which causes any detriment to the department, its personnel, any inmate, [or] prisoner . . . shall be considered neglect of duty”); 3.1 – Supervision (providing that “[a] supervisor is ultimately responsible for the actions of his subordinates and will be held accountable when circumstances indicate that he/she has failed to properly supervise” and “[s]upervisors are expected to prefer disciplinary charges or to take other appropriate disciplinary action when indicated”); 3.2 – Security (describing that “[a]ny act of commission or omission tending to undermine security shall constitute a breach of security”); 3.6 - Departmental Reports (requiring that “[p]ersonnel shall submit all necessary reports . . . of an incident necessitating a report”). (R-9).

The Department also charged Connors with violating the following general orders: 042 – Hospital Transports and Duty (requiring “the necessary level of supervision and control for offenders who are transported to the hospital or assigned to a hospital duty” and providing that “officers are not to be distracted while performing hospital duty” and “[p]ersonal electronic devices are strictly prohibited”); 073 – Personal Conduct of Employees (providing that “[a]ll departmental employees, when on and off duty, will conduct themselves in a manner that will not bring disrepute or criticism to the department;” “[c]ommon sense, good judgment, consistency and the department’s mission will be the guiding principles for the expected employee standard of conduct;” “[e]mployees are expected to treat fellow employees . . . with respect and courtesy at all times;” and, “[e]mployees will not exhibit behavior that demonstrates prejudice or that holds any person, group, or organization up to ridicule or contempt”); and 074 – Professional Code of Conduct (stating that “[c]onduct which detracts from a professional

and ethical manner is prohibited and circumstances suggesting an officer has engaged in unbecoming conduct will be investigated and disciplinary action will be taken when appropriate"). (R-11 to R-13). The Department also included the notation "et al." at the end of the charges section.

On the PNDA, the Department described the incidents giving rise to the charges as follows:

On or about 05 February 2015, during an internal affairs interview, you admitted that C/O Jacob texted you photographs of officers and supervisors sleeping at the hospital. It was discovered that you made a comment about a male sex organ that was drawn on one of the pictures. You stated that you were unaware when the pictures were taken and never reported it to the Department. You admitted that you never discouraged officers from bringing cell phones while on hospital duty which is a direct violation of policy and procedures. Also, an officer texted you while he was on duty and again never reported this to the Department. As a Lieutenant, you are held to a higher standard and your conduct shows a lack of responsibility and accountability. Your actions violate policy and procedures as well as compromise the safety and security and bring the [Department] in disrepute.

After a departmental hearing at which the charges against Connors were sustained, the Department issued a FNDA demoting Connors to a position as a corrections officer, effective September 30, 2015. (R-1).

On October 7, 2015, Connors appealed the Department's disciplinary action to the Commission, and on November 30, 2015, the Commission transmitted the matter to the OAL for a contested case hearing.

At the hearing, Department employee Lieutenant Harry Sweeten (Sweeten), testified for Connors, and Department employees Foschini, Warden Karen Taylor, and Sergeant James Burke testified for the Department. Connors did not testify.

Lieutenant Harry Sweeten

Sweeten has been a lieutenant since October 2013, was a sergeant from 2009 to 2013, a supervisor from 2008 to the present, and started his employment with the Department on April 8, 2002. Sweeten had no personal knowledge of the charges against Connors and noted that he was testifying under subpoena and did not volunteer to testify.

Sweeten is familiar with and has worked hospital duty in the past. This includes ER visits and monitoring inmates in the hospital. Sweeten supervised hospital duty in 2014 and 2015. Hospital duty involves first going to a munitions booth to get necessary equipment, then going to the hospital to relieve those who are working there. Usually a two-person team is assigned to each inmate. They take one Department-issued radio per team and stay in the room or in the adjacent hallway. At the time of the incident, radios often could not reach the jail and so telephones would have to be used in the room or from the nurses' station. Using the nurses' station requires the officer to leave the inmate. New radios have been provided since this incident and the county jail is now in range. There are no bedside phones in ER, trauma, or in the ICU. Assigned officers are required to check-in two times during the shift.

Sweeten was unaware that an officer had a cell phone while on official duty. He is aware that Department policy prohibits cell phones at the hospital. He did not frisk officers prior to hospital duty, but if he had caught them, he would have taken action.

Deputy Warden Christopher Foschini

Deputy Warden Foschini (Foschini) testified about his February 5, 2015, interrogation of Connors in connection with an Internal Affairs investigation into the improper use of cell phones by corrections officers while on duty at the jail and at various hospitals.⁴ Specifically, Foschini questioned Connors about text messages and photographs he exchanged with or received from Jacob, whose cell phone had been

⁴ At the time of the interview, Foschini held the rank of captain with the Department.

confiscated at the jail on December 30, 2014, and sent by the Department to the CCPO for a data extraction report.

During the interview, Connors denied having knowledge of cell phone use by correction officers in the jail but admitted that he did not "discourage" such use when officers were on hospital duty, even though such use was not permitted.

Connors also admitted that he received from Jacob photographs of officers sleeping and wearing earphones while on hospital duty, and further admitted that he did not report these incidents or seek an investigation into these matters, which Foschini described as "safety concerns that go along with being inattentive on duty."

Although Connors stated that he was off duty when he received various text messages and photographs from Jacob, and also stated that he did not know when the photos were taken, Foschini testified that Connors conceded during the interview that, as a lieutenant, he should have reported the photographs to a supervisor for further investigation, whether he was off duty or not when he saw the photographs.

Rather than report the photographs, Connors instead commented on one of the photographs that had a drawing of a penis superimposed on the face of a corrections officer by stating, "I guess Calio [the officer in the photograph] didn't fall asleep. Just ate dick." When Foschini asked him "Why didn't you do anything about that [photograph]?" Connors replied, "I just thought it was somebody breaking somebody else's balls." However, when Foschini asked Connors, "Should they be taking pictures like that at a hospital of each other?" Connor replied, "No."

Foschini further testified that Connors and Jacob exchanged 142 text messages between April 16, 2014, and December 30, 2014. To obtain this information, Foschini provided the CCPO Jacob's cell phone in order for the CCPO to extract data from the device. The CCPO then provided Foschini a data extraction report on compact discs, which Foschini then printed out.

Although Foschini obtained information from sign-in sheets and payroll records that, when compared to the timestamps on the data extraction report, indicated that Jacob was at the jail when he sent some of the text messages, Connors denied that he thought Jacob was working when he sent various text messages.

However, Foschini recounted his exchange with Connors about one of the text messages as follows: "On April 16th Jacob was telling you, 'get me out of here tonight. I'm borderline. P.S. I don't have my cell phone on me. Haha. Don't forget to check in.'" And then I said, "What does that sound like?" He said, "Sounds like he sent it from the parking lot." I said, "At 5:45 p.m. and he clocked in at 6:43 that morning and he closed out about 7:00, that sounds like he sent it from the parking lot?" And I said, "P.S. I don't have my cell phone on me, haha." I said, "Come on, Joe, what does that sound like?" "Yeah, it sounds like he sent it from in here [i.e., the jail]."

Foschini testified that he understood "borderline" to mean that Jacob was "at the jail" and "on the list to be overtime for it," but that "he doesn't want to work overtime" and "wants the next shift commander, Lieutenant Connors, to get him out of there."

According to Foschini, there were other inappropriate text messages between Connors and Jacob, including Connors encouraging Jacob to file a lawsuit after getting passed over for a promotion, comments about superior female officers, and racially insensitive comments.

"Did you see what you did wrong? He said, "Yes." I said, "What's that?" He said, "I engaged in conversation with subordinates, for one, and I didn't do anything about the pictures and that was wrong. But like I said, I didn't know when the pictures were taken. When I'm not here, and this sounds terrible, but I'm -- when I'm not here I don't really think about this place."

Foschini testified that, based on his investigation, he wrote a report concluding that Connors should not be in a supervisory position. According to Foschini, "As a sergeant,

or a lieutenant, Lieutenant Connors would evaluate officers. How can you evaluate officers when you're referring to your subordinates as sucking dick? Or eating dick. You know your officers are violating policy and smuggling phones into a jail, into the hospital, taking photographs and doing nothing about it as a supervisor. You have officers that are clearly sleeping. Clearly being inattentive to their duties by wearing headphones in their ear. Eyes shut, glasses up in the air. Don't care what's going on. And you do nothing about it. You have murderers. You have rapists. You have all kinds of criminals at the hospital and you're allowing this?"

Foschini denied that corrections officers needed to bring cell phones to the various hospitals due to issues with their radios or they did not have access to landlines to communicate with central command.

Warden Karen Taylor

Karen Taylor (Taylor) was the jail's warden at the time of her testimony and had worked for Camden County for twenty-one years, including service as a correction officer, sergeant, lieutenant, and captain prior to her wardenship. She was a captain at the time the instant charges were preferred against Connors and signed the PNDA and FNDA that were issued to Connors.

Taylor described the duties of a lieutenant and sergeant as "distance yourself [from subordinates], be a leader, evaluate the staff, recommend discipline when necessary, follow the policy and procedures" and "also be an example to the staff."

Taylor testified that "if an individual is off duty and they see wrongdoing, it is their responsibility to make us aware of it and recommend discipline."

For a short period while she was captain, Taylor supervised Connors, who in her opinion, "was not a leader. He was -- too close to staff. Too -- against administration. He was not a leader. He -- to me, he did not stand up and do the right thing."

After she reviewed Foschini's investigative report, Taylor "made a recommendation to [then] Warden Owens that we should demote [Connors] based on the fact that I did not have confidence in him that he could lead our department, supervise our staff."

Taylor testified that personal cell phones are considered "contraband" in the Department's facilities, defining contraband as "something that is introduced into the facility that has not been authorized by the Department to be brought into the facility," like weapons and drugs.

According to Taylor, Connors' demotion is appropriate due to his violations of various departmental rules of conduct and general orders regarding unbecoming conduct, neglect of duty, failure to supervise or report wrongdoing, and security protocols. Taylor stated that Connors knew that corrections officers were using cell phones while on duty, but didn't report it, and he knew that officers were sleeping on the job, but didn't report it; he engaged in inappropriate text message exchanges with Jacob, a subordinate officer, about other subordinate officers and superior officers; and, during his Internal Affairs interview, Connors initially denied, but later admitted, that he saw photographs of officers sleeping on the job and that Jacob had, on certain occasions, used a cell phone while on duty.

While Taylor acknowledged that Connors was off duty when he received text messages and photographs from Jacob, Taylor explained that Connors was not therefore "off duty from his responsibility of notifying the Department of any wrongdoing." She further explained that, whether or not Connors knew that Jacob was using a cell phone while on duty or knew that officers depicted in certain photographs were sleeping, the case against Connors is "not based on an assumption of what he should have known. It's based on the fact that he, as a supervisor, should have investigated the matter." Taylor stated that, under the department's rules, certain matters regarding the general discharge of duty are left to the intelligence and discretion of the individual, and that

Connors did not properly exercise discretion by failing to report potential wrongdoing relating to cell phone use and officers sleeping on duty.

Taylor also testified that "in 2015, and previous to that, we put et al. instead of listing every and any general order on the charges," but that "[w]e were advised that instead of doing that we should just list all the general orders" and that "since then we've been doing so."

Finally, she denied receiving any complaints about faulty radio systems or lack of access to landlines at the various hospitals where corrections officers were assigned.

Sergeant James Burke

Sergeant James Burke (Burke) was in charge of the maintenance of the Department's communications systems in 2014 and 2015. During that time, he was not aware of any issues, and did not receive any complaints, regarding radio communications from corrections officers on hospital duty. Burke also testified that, even if there were problems with radio communications, officers could have used landlines at the hospital to communicate with central command. He also confirmed that officers are not permitted to use personal cell phones while on hospital duty. However, Burke testified that, beginning in 2016, officers were given department-issued cell phones to communicate with central command while on hospital duty.

Post-Hearing Submissions

Connors' Motion to Exclude Exhibit R-3

After the close of testimony, Connors filed a motion to exclude Exhibit R-3, which is the cell phone extraction report showing that Jacob and Connors exchanged 142 text messages between April 16, 2014 and December 30, 2014. The report includes a column showing the date and time each text was either sent by Jacob or received in his inbox.

The Department relies on the extraction report in part to show that Connors knew or should have known that Jacob was using his personal cell phone while on duty. Connors seeks to exclude R-3 because “without authentication and evidence establishing accuracy of the timestamps, the evidence is inadmissible, and the charges that [Connors] knew or should have known that Jacob possessed contraband (cell phone) in the jail cannot be sustained.” According to Connors, there was “no testimony regarding the chain of custody [of the cell phone from the Department to the CCPO] and manipulation of data in the cell phone” and “[t]here has been no competent testimony from anyone with first-hand knowledge as to the preparation of R-3[.]”

In opposition, the Department maintains that Connors has failed to raise a genuine issue of authenticity with respect to R-3, and even if he has, the Department has provided an affidavit from Kate Scully, the CCPO detective who extracted the data from Jacob's cell phone, confirming the authenticity of the report. In her affidavit, Scully attests that Foschini gave her Jacob's cell phone on December 30, 2014, and she then performed a “Cellebrite Advanced Logical Extraction” on Jacob's device. The extracted data “was burned to a media device and turned over to [Foschini].” According to Scully, “[t]he device findings cannot be altered in any way by the operator of the Cellebrite Software” and she “did not make any changes, and/or corrections to any of the text messages contained in the extraction.”

Post-Hearing Briefs and Connors' Motion to Exclude Exhibits R-8, R-10, and R-14

In February 2018, the Department submitted a post-hearing brief, and in March 2018, Connors submitted his post-hearing brief. In their submissions, the parties not only argued their positions on the ultimate issue in this case – whether the Department has met its burden of proof on its charges against Connors and, if so, whether a two-level demotion is the appropriate penalty for Connors' infractions – but also offered procedural arguments regarding the admissibility of certain exhibits, including a reiteration of their positions on the admissibility of R-3.

Connors contends that the Department has failed to prove the charges against him, and even if they have, a two-level demotion is an inappropriate penalty. Connors also renews his motion to exclude R-3, and objects to the admission of Department exhibits R-8, R-10, and R-14, which are Department orders that the Department also alleges Connors violated, but which were not specifically included in the PNDA or FNDA.

In contrast, the Department submits that it has met its burden of proof on the charges against Connors, and that his demotion from lieutenant to corrections officer is the appropriate penalty for his infractions. The Department again opposes Connors' motion to exclude R-3, and argues that the various orders at R-8, R-10, and R-14, are other proper grounds for charges against Connors because he had notice of those exhibits in advance of the OAL hearing, and that those exhibits should be admitted into evidence.

Before I make findings of fact and assess the merits of this case, I must rule on Connors' outstanding evidentiary motions. Thus, for the reasons that follow, I hereby **ORDER** that Connors' motion to exclude R-3 from evidence is **DENIED**, but that Connors' motion to exclude R-8, R-10, and R-14 is **GRANTED**.

The evidence rules under the Uniform Administrative Procedure Rules, which are located at N.J.A.C. 1:1-15.1 to -15.12, are designed "to promote fundamental principles of fairness and justice and to aid in the ascertainment of truth." N.J.A.C. 1:1-15.1(b). Generally, all relevant evidence is admissible; however, "[o]nly evidence which is admitted by the judge and included in the record shall be considered." N.J.A.C. 1:1-15.1(a) and (c). A judge may exclude any evidence if its probative value is substantially outweighed by the risk that its admission will either necessitate undue consumption of time or create substantial danger of undue prejudice or confusion. N.J.A.C. 1:1-15.1(c).

Under N.J.A.C. 1:1-15.6, which addresses authenticity issues,

[a]ny writing offered into evidence which has been disclosed to each other party at least ten days prior to the hearing shall be presumed authentic. At the hearing any party may raise questions of authenticity. Where a genuine question of authenticity is raised the judge may require some authentication of the questioned document. For these purposes the judge may accept a submission of proof, in the form of an affidavit, certified document or other similar proof, no later than ten days after the date of the hearing.

[Ibid.]

In this matter, the Department abided by the ten-day requirement under N.J.A.C. 1:1-15.6 and, thus, a presumption of authenticity attached to R-3. However, at the hearing, Connors questioned the authenticity of R-3. According to Connors, the timestamps included in R-3 cannot be used to show when Jacob sent text messages to or received text messages from Connors because there was "no testimony regarding the chain of custody [of the cell phone from the Department to the CCPO] and manipulation of data in the cell phone" and "[t]here has been no competent testimony from anyone with first-hand knowledge as to the preparation of R-3[.]"

Although it is debatable whether Connors has raised a genuine issue about the authenticity of R-3 – a mere allegation, without some proof or some indication, of manipulation would seem insufficient to rebut the presumption of authenticity of a document prepared by a county prosecutor's office – the Department nonetheless responded with an authentication affidavit from the CCPO employee who prepared the extraction report.

Specifically, Kate Scully (Scully) attested that she received Jacob's phone from Foschini, performed a data extraction from Jacob's phone, put the information on computer discs, and gave the discs to Foschini, who testified that he printed out the extracted data that is seen in R-3. Moreover, Scully certified that "[t]he device findings cannot be altered in any way by the operator of the Cellebrite Software" and she "did not make any changes, and/or corrections to any of the text messages contained in the extraction." As such, Scully's affidavit and Foschini's testimony represent sufficient proof

of the authenticity of R-3. Connors' motion to exclude R-3 is therefore **DENIED**, and the exhibit is admitted as evidence of what the Department purports it to be – a document showing the number, content, and timing of text messages exchanged between Jacob and Connors between April 2014 and December 2014.

However, Connors' motion to exclude from evidence R-8 (order regarding Internal Affairs policies and procedures), R-10 (order regarding employee searches when entering jail), and R-14 (order regarding ethical use of technology), which are orders regarding employee conduct that were not specifically listed in the PNDA or FNDA issued against Connors is **GRANTED**, because the catchall "et al." cannot be reasonably interpreted as giving Connors sufficient notice of further charges for violations of internal rules and regulations that were not specifically listed in the notices of disciplinary action. Indeed, "[i]t is firmly established that an employee cannot legally be tried or found guilty on charges of which he has not been given plain notice by the appointing authority, and the *de novo* hearing on an administrative appeal is limited to the charges made below." Dep't of Law & Pub. Safety, Div. of Motor Vehicles v. Miller, 115 N.J. Super. 122, 126 (App.Div.1971) (citing W. New York v. Bock, 38 N.J. 500, 522 (1962)).

FINDINGS OF FACT

Based on the foregoing credible testimony and other admitted evidence, I **FIND** that, during his Internal Affairs interview, Connors initially denied, but later admitted, that he saw photographs of officers sleeping on the job and that Jacob had, on certain occasions, used a cell phone while on duty. I also **FIND** that Connors knew that corrections officers were improperly using cell phones while on duty, but didn't report it, and he knew that officers were sleeping on the job but didn't report it. I also **FIND** that even if there were problems with the Department radios issued to officers on hospital duty, officers were not permitted to use personal cell phones while on hospital duty. Finally, I **FIND** that Connors engaged in inappropriate text message and photograph exchanges with Jacob, a subordinate officer, about other subordinate officers and superior officers.

LEGAL DISCUSSION

The Civil Service Act, N.J.S.A. 11A:1-1 to -12-6, and its implementing regulations, N.J.A.C. 4A:1-1.1 to -10-3.2, are designed in part "to encourage and reward meritorious performance by employees in the public service and to retain and separate employees on the basis of the adequacy of their performance." N.J.S.A. 11A:1-2(c). A public employee may be subject to discipline for several reasons, including "failure to perform duties," "conduct unbecoming a public employee," "neglect of duty," and "other sufficient cause," which may include violations of an appointing authority's internal rules and regulations. N.J.A.C. 4A:2-2.3(a). Major discipline for such infractions may include removal, disciplinary demotion, or a suspension or fine of more than five working days. N.J.A.C. 4A:2-2.2(a). If a public employee appeals a major disciplinary action, the burden of proof at a hearing shall rest with the appointing authority.⁵ N.J.A.C. 4A:2-1.1; N.J.A.C. 4A:2-1.4(a); N.J.A.C. 4A:2-2.9.

For the following reasons, the Department has met its burden of proof that Connors may be subject to discipline for his failure to perform his duties, unbecoming conduct, neglect of duty, and other sufficient cause for engaging in inappropriate text message and photograph exchanges with Jacob, a subordinate officer, and for failing to report correction officers whom he knew or should have known were improperly using personal cell phones or sleeping while on duty.

Failure to perform duties and neglect of duty

First, the Department has successfully proven the charges of incompetency, inefficiency, or failure to perform duties, N.J.A.C. 4A:2-2.3(a)(1), and neglect of duty, N.J.A.C. 4A:2-2.3(a)(7). While failure to perform duties and neglect of duty are separate bases for discipline, these terms are essentially interchangeable. Indeed, although the civil service regulations do not define these terms, the Department's Rule of Conduct 1.3

⁵ In administrative hearings, the standard of proof is a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962)

both defines "neglect of duty" with respect to Department employees and shows that the term "neglect of duty" may subsume "failure to perform duties." Specifically, that rule provides in relevant part that "neglect of duty" is "[a]ny act of omission or commission indicating the failure to perform . . . any rule, regulation, directive, order, or standard operating procedure . . . which causes any detriment to the department, its personnel, any inmate, [or] prisoner . . . shall be considered neglect of duty."

Here, Connors admitted in his Internal Affairs interview with Foschini that he neglected his duty and failed to perform his duties as a lieutenant when he failed to discourage personal cell phone use by officers on duty, when he failed to report that he saw pictures of officers wearing earphones and/or sleeping while on duty, and he also neglected or failed to perform his duties as a superior officer because he knew or should have known that, on certain occasions, Jacob had used his personal cell phone to text him while Jacob was on jail duty, and Connors should have reported or sought an investigation into Jacob's cell phone use while on duty. These are all acts of omission indicating a failure to perform his duties and neglect of duty which caused detriment to the department, its personnel, or inmates.

The security risks that flow from corrections officers sleeping on duty is self-evident and, as a lieutenant, Connors certainly should have reported that he saw photographs of what appeared to be officers sleeping on duty. Warden Taylor also testified that unauthorized cell phones are considered contraband and security risks, and Connors should have certainly prohibited his subordinates from using cell phones on hospital duty, and he should have prohibited Jacob from using his cell phone while on jail duty.

Warden Taylor credibly testified that, regardless of whether Connors was off duty when he became aware or should have become aware of potential wrongdoing by corrections officers, Connors was not therefore "off duty from his responsibility of notifying the Department of any wrongdoing."

Based on the foregoing, I **CONCLUDE** that Connors neglected his duties and failed to perform his duties in violation of the civil service rules and the Department's Rule of Conduct 1.3. This charge is **SUSTAINED**.

Unbecoming Conduct

The Department has also met its burden of proof with respect to the charge of unbecoming conduct. As one court has explained, the term "unbecoming conduct" or "conduct unbecoming a public employee" is "elastic" and "has been defined as 'any conduct which adversely affects the morale or efficiency of the [agency] [or] which has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] services.'" In re Emmons, 63 N.J. Super. 136, 140 (App.Div.1960) (quoting Zeber Appeal, 398 Pa. 35, 43 (1959)).

Under the Department's Rule of Conduct 1.2 – Unbecoming Conduct, "[a]ll personnel are required to conduct themselves both on and off duty in such a manner as to reflect favorably on the department," and "unbecoming conduct" includes such conduct "which impairs the operation or efficiency of the department or the employee." Similarly, the Department's General Order 073 – Personal Conduct of Employees provides that "[a]ll departmental employees, when on and off duty, will conduct themselves in a manner that will not bring disrepute or criticism to the department," and General Order 074 – Professional Code of Conduct states that "[c]onduct which detracts from a professional and ethical manner is prohibited and circumstances suggesting an officer has engaged in unbecoming conduct will be investigated and disciplinary action will be taken when appropriate."

Here, Warden Taylor and Deputy Warden Foschini credibly testified that Connors engaged in unbecoming conduct, and conduct that violates the Department's general orders regarding personal and professional conduct, by allowing corrections officers to use personal cell phones while on hospital duty, by failing to report that corrections officers were sleeping on the job, by engaging in inappropriate text message exchanges

with Jacob, a subordinate officer, about other subordinate officers and superior officers, and by initially denying, but later admitting during his Internal Affairs interview, that he saw photographs of officers sleeping on the job and that Jacob had, on certain occasions, used a cell phone while on duty. In this matter, I **CONCLUDE** that Connors' behavior impaired the operation or efficiency of the Department and constitutes conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6) and the Department's Rule of Conduct 1.2. This charge is **SUSTAINED**.

Other Sufficient Cause

Finally, the Department has proven that there is other sufficient cause for disciplining Connors, including his violation of the Department's Rules of Conduct 3.1 – Supervision (providing that “[a] supervisor is ultimately responsible for the actions of his subordinates and will be held accountable when circumstances indicate that he/she has failed to properly supervise” and “[s]upervisors are expected to prefer disciplinary charges or to take other appropriate disciplinary action when indicated”); 3.2 – Security (“[a]ny act of commission or omission tending to undermine security shall constitute a breach of security”) and, 3.6 – Departmental Reports (requiring that “[p]ersonnel shall submit all necessary reports . . . of an incident necessitating a report”) and General Order 042-Hospital Transports and Duty (requiring “the necessary level of supervision and control for offenders who are transported to the hospital or assigned to a hospital duty” and providing that “officers are not to be distracted while performing hospital duty” and “[p]ersonal electronic devices are strictly prohibited”).

As Foschini testified, Connors admitted in his Internal Affairs interview that he did not discourage personal cell phone use by officers on hospital duty and Connors did not report that he saw pictures of officers sleeping on the job. According to Foschini, personal cell phone use and sleeping while on duty are “safety concerns that go along with being inattentive on duty.” By failing to discourage cell phone use by officers on hospital duty and by failing to report that he saw pictures of officers sleeping on duty, I **CONCLUDE** that Connors failed to properly supervise his subordinates, in violation of Rule of Conduct

3.1; undermined security, in violation of Rule of Conduct 3.2; failed to submit a necessary report, in violation of Rule of Conduct 3.6; and, failed to ensure the necessary level of supervision and control of officers assigned to hospital duty, in violation of General Order 042. The charge of "Other Sufficient Cause" is **SUSTAINED**.

In sum, I **CONCLUDE** that a preponderance of the credible evidence supports the Department's charges against Connors.

PENALTY

Since the Department has proven the charges against Connors, it is necessary to determine the penalty to be imposed. This inquiry often involves the concept of progressive discipline, which provides that "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Hermann, 192 N.J. 19, 29 (2007) (citing Bock, 38 N.J. at 522). An employee's past record includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." Bock, 38 N.J. at 523-24.

The concept of progressive discipline may "support the imposition of a more severe penalty for a public employee who engages in habitual misconduct" or "mitigate the penalty for a current offense . . . for an employee who has a substantial record of employment that is largely or totally unblemished by significant disciplinary infractions." Hermann, 192 N.J. at 30-33. However, progressive discipline may be bypassed "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." Id. at 33.

In this case, Connors' record includes a promotion to lieutenant in 2013 and a handful of reprimands since he began his employment with the Department in 1998.

Connors has also received a formally adjudicated thirty-day suspension for neglect of duty arising from his failure to report or investigate inmates' complaints about defaced property in their cells. However, in that matter, In re Connors, 2019 N.J. CSC LEXIS 28 (Jan. 16, 2019), the Department issued the PNDA on February 6, 2015, the same day as the Department issued the PNDA in this matter, and the Commission did not issue a final decision in the other matter until January 16, 2019. As such, the thirty-day suspension should not be considered part of Connors' disciplinary history in this matter.

Despite Connors' recent promotion and an otherwise unremarkable disciplinary history, the question becomes whether progressive discipline should be bypassed such that Connors should be subject to the two-level demotion sought by the Department because his misconduct renders him unsuitable for continuation in a supervisory position. While each disciplinary matter must be decided on its own merits, other cases involving demotions of corrections supervisors for disciplinary reasons are instructive in determining the appropriate discipline for Connors' misconduct.

In In re Delgado, 2010 N.J. Super. Unpub. LEXIS 2936 (App.Div. December 9, 2010), an appellate panel upheld the demotion of a county corrections lieutenant to sergeant for repeated sexual harassment of a female subordinate despite an absence of major discipline on his record. According to the court, "[c]ertainly the Commission had discretion to impose a lesser penalty such as a period of suspension," but appellant "also could have received a more severe, two-step demotion, or even been terminated." Id. at *14. Instead, the Commission bypassed progressive discipline by ordering a one-level demotion, which the court concluded was not "unwarranted" given the seriousness of the appellant's misconduct. Ibid.

In In re Wilson, 2019 N.J. Super. Unpub. LEXIS 323 (App.Div. February 8, 2019), the court affirmed the demotion of a corrections sergeant to corrections officer for falsely reporting that subordinate officers had completed a security check and then lying about it. In that case, the appellant's disciplinary record included several similar offenses over the course of seventeen years. The court concluded that "the evidence supports the

Commission's finding that [appellant's] conduct demonstrated that she was unsuitable to continue in her role as a supervisor and her continuation in a supervisory position was inimical to the safety and security of the inmates and staff," and that "[g]iven the circumstances present, and [appellant's] prior disciplinary history, the demotion does not shock our sense of fairness." Id. at *7 (internal citation and quotation omitted).

And In re Cusick, 2012 N.J. Super. Unpub. LEXIS 442 (App. Div. March 1, 2012), the court upheld a forty-five-day suspension and one-step demotion of a county corrections lieutenant to sergeant for sleeping on duty in the jail's master control room even though he had an otherwise unblemished disciplinary record.⁶ In so doing, the court noted that "public safety concerns are a legitimate issue to consider in addressing the propriety of sanctions against police and corrections officers" and "[h]ence, the sanction, which took into consideration the gravity of the conduct as well as [appellant's] excellent record, does not shock the conscience."

Here, like in those cases, Connors' misconduct warrants the circumvention of progressive discipline. However, like in Wilson, but unlike in Delgado and Cusick, Connors' "conduct demonstrated that [he] [is] unsuitable to continue in [his] role as a supervisor and [his] continuation in a supervisory position [is] inimical to the safety and security of the inmates and staff," and I CONCLUDE that the appropriate penalty for Connors' misconduct is a two-level demotion from lieutenant to corrections officer because he knew or should have known that, contrary to Department policy, officers were using personal cell phones while on jail and hospital duty, and that, contrary to any workplace policy, let alone a workplace that requires round-the-clock supervision of criminals, he knew officers were sleeping on the job and failed to take any action to bring an end to such malfeasance.

⁶ The appointing authority had sought a two-step demotion, but the ALJ had reduced the penalty to a one-step demotion due to the appellant's unblemished record over twenty-three years of service, and the Commission adopted that penalty. Id. at *4.

Like in Delgado, the Department could have sought a lesser penalty such as a suspension, but also could have sought a harsher penalty such as termination for Connors' misconduct. However, the Department instead concluded that the appropriate penalty was to strip Connors of his leadership role due to his repeated failure to act like a leader. After a de novo hearing, I agree with that decision.

ORDER

Based on the foregoing, I hereby **ORDER** that Connors be demoted from lieutenant to corrections officer.

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.

3/3/2020
DATE


ELIA A. PELIOS, ALJ

Date Received at Agency:

March 3, 2020 (mailed)

Date Mailed to Parties:

March 3, 2020 (mailed)

EAP/mel

APPENDIX

WITNESSES

For Appellant:

Lieutenant Harry A. Sweeten, Jr

For Respondent:

Deputy Warden Christopher Foschini

Warden Karen Taylor

Sergeant James Burke

EXHIBITS

For Appellant:

A-1 Audio disc of February 5, 2015, Internal Affairs interview of Joseph Connors

For Respondent:

R-1 Preliminary Notice of Disciplinary Action (31-A), Civil Service Commission, State of New Jersey, dated February 6, 2015; Final Notice of Disciplinary Action (31-B), Civil Service Commission, State of New Jersey, dated October 2, 2015

R-2 Camden County, Office of the Warden, Correction Facility, Introduction of Cell Phones in the Jail and Hospital Duties/Failure to Supervise Investigative Report, by Case Investigator Captain Christopher Foschini #5, dated December 30, 2014

R-3 Extraction Report, Cell Phone Text Messages, from April 16, 2014 through December 30, 2014

- R-4 Sign-in Sheet for A1 Shift, from April 16, 2014 through December 7, 2014
- R-5 Photographs of Officers and Supervisors Sleeping on Hospital Duty:
 - a. Sergeant Lucas Marchiano;
 - b. Correctional Officer Abraham Baltodano;
 - c. Correctional Officer Jamal Danford;
 - d. Correctional Officer Mark DeCosmo;
 - e. Correctional Officer Matthew Calio
 - f. Photograph of Warden Owens at the Academy Graduation.
- R-6 Interview with Lieutenant Joseph Connors, by Captain Christopher Foschini, Captain Rebecca Franceschini, and Sergeant John Jones, dated February 5, 2015
- R-7 New Jersey Civil Service Commission, Job Specification 01398@, County Correction Lieutenant; New Jersey Civil Service Commission, Job Specification 01405@, County Correction Sergeant
- R-8 Camden County, New Jersey, Department of Corrections, Internal Affairs Section, Order Number 001, Related Standards 4-ALDF-2A; 6A (A.C.A.), Approved by the Warden of the Camden County Department of Corrections and the Camden County Board of Chosen Freeholders, Adopted November 1, 2006, Revised September 1, 2011, January 11, 2008
- R-9 Camden County, New Jersey, Department of Corrections, Rules of Conduct, Related Standards 4 ALDF-7D-06 (A.C.A.), 4 ALDF-7D-08 (A.C.A.), 10A:31-4.1 (N.J.A.C.), Approved by the Warden of the Camden County Department of Corrections and the Camden County Board of Chosen Freeholders, Adopted January 1, 1995, Revised September 1, 2011, December 12, 1996, May 3, 1996
- R-10 Camden County, New Jersey, Department of Corrections, Lobby Security Officer, Order Number 032, Related Standards 4-ALDF-2A-03 (A.C.A.), 4-ALDF-2A-04, 4-ALDF-2A-05, 10A:31-8.12 (N.J.A.C.), Approved by the Warden of the Camden County Department of Corrections and the Camden County Board of Chosen Freeholders, Adopted May 4, 2004, Revised September 1, 2011, October 11, 2007

- R-11 Camden County, New Jersey, Department of Corrections, Hospital Transports and Duty, Order Number 042, Related Standards 4-ALDF-4D-27 (A.C.A.), 10A:31-8.14 (N.J.A.C.), Approved by the Warden of the Camden County Department of Corrections and the Camden County Board of Chosen Freeholders, Adopted January 1, 1995, Revised April 4, 2014, September 1, 2011, September 7, 2009, November 1, 2006, December 12, 1996, August 15, 1994
- R-12 Camden County, New Jersey, Department of Corrections, Personal Conduct of Employees, Order Number 073, Related Standards 4-ALDF-7D-01, A.C.A. 4 ALDF-7d-06, A.C.A. 4 ALDF-7D-08, N.J.A.C. 10A:31-4.1, N.J.A.C. 10A:31-4.2, Approved by the Warden of the Camden County Department of Corrections and the Camden County Board of Chosen Freeholders, Adopted February 1, 2009, Revised April 4, 2014, September 1, 2011
- R-13 Camden County, New Jersey, Department of Corrections, Professional Code of Conduct, Order Number 074, Related Standards A.C.A. 4-ALDF-7C-02, A.C.A. 4 ALDF-7C-03, N.J.A.C. 10A:31-4.1, N.J.A.C. 10A:31-4.2, Approved by the Warden of the Camden County Department of Corrections and the Camden County Board of Chosen Freeholders, Adopted February 1, 2009, Revised September 1, 2011
- R-14 Camden County, New Jersey, Department of Corrections, Ethical Use of Technology, Order Number 203, Approved by the Warden of the Camden County Department of Corrections and the Camden County Board of Chosen Freeholders, Adopted October 5, 2010, Revised September 1, 2011
- R-15 Appellant Joseph Connors Chronology of Discipline