



STATE OF NEW JERSEY

In the Matter of Robert Pharo,
Atlantic County

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

CSC Docket No. 2021-37

Request for Reconsideration

ISSUED: OCTOBER 2, 2020 (JET)

Atlantic County, represented by Jennifer P. Starr, Esq., requests reconsideration¹ of the attached decision, *In the Matter of Robert Pharo* (CSC, decided May 20, 2020), which modified Pharo’s removal to a 45 working day suspension.

As background, on August 18, 2019, Pharo contacted his supervisor and indicated that he had witnessed two inmates commit a facility rules violation. Subsequently, the supervisor instructed Pharo to submit a disciplinary action report pertaining to the incident. Pharo refused to submit such report as he believed the inmate would retaliate against him and harm his family. Pharo’s belief was based on the inmate’s criminal history, despite that the inmate did not verbally threaten him. Pharo was also instructed to write a separate report indicating what he had witnessed, and provided an explanation within that report indicating the reasons why he did not want to submit the disciplinary action report, which Pharo also refused to submit. Pharo was charged with neglect of duty, incompetency, inefficiency and failure to perform duties, insubordination, inability to perform duties, violations of rules and regulations, and other sufficient cause, and removed from service effective August 28, 2019. Pharo appealed and the matter was transferred to the Office of Administrative Law (OAL) as a contested case. After a hearing, the Administrative Law Judge (ALJ) determined that the charges were sustained. The ALJ in discussing the penalty, noted that Pharo did not have any

¹ Atlantic County also requested a stay of the Commission’s decision. However, since the Commission is deciding the request for reconsideration on the merits, the request for a stay is moot.

disciplinary history. The ALJ also noted that Pharo was seeking a second chance and promised that he would not exhibit such behavior again as his behavior was irrational. The ALJ found that Pharo witnessed a blatant minor violation and he ignored the incident as he believed that by doing so he was protecting himself and his family from retaliation. As a result, he refused to submit the disciplinary action report and, although he eventually submitted the incident report, the contents of the incident report contained false information. As such, the ALJ determined that Pharo's behavior jeopardized the safety and security of the workplace. Accordingly, the ALJ recommended upholding the removal. Upon its *de novo* review, the Civil Service Commission (Commission) did not uphold the removal. Rather, the Commission modified the removal to a 45 working day suspension. In the prior matter, the Commission determined that mitigating factors warranted a lesser penalty, as Pharo had no prior disciplinary history, and all involved agreed that his conduct was aberrational as there were no similar incidents throughout his 13 years of employment. Additionally, the Commission warned Pharo that the 45 working day suspension was significant and in no way minimized his behavior and that any future similar infractions would support a disciplinary penalty up to and including removal.

In its request to the Commission, the appointing authority asserts that the only issue to be considered was the appropriate penalty. The appointing authority contends that Pharo, who possesses 13 years of experience, was fearful of an inmate and was concerned the inmate would harm him and his family.² The appointing authority explains that Pharo's concerns were based on the inmate's criminal background, despite that the inmate did not make any actual threats.³ Further, the appointing authority states that Pharo failed to provide an explanation for his refusal to provide a disciplinary action report. The appointing authority adds that, not only did Pharo fail to include his reasons for not writing the disciplinary report, but he provided incorrect information in the reports.⁴ The appointing authority explains that because Pharo witnessed the inmate commit a violation, he was required to complete and submit a disciplinary action report, and such report is used to provide notice of the charges to the inmate. The appointing authority adds that the incident report documents any observations and actions taken by County Correctional Police Officers that occurred at the time of a particular incident. As such, the appointing authority states that Pharo's inability to submit the reports constitutes a threat to the safety of the facility, which is sufficient reason to terminate him. As such, the appointing authority explains that it properly removed Pharo, as he failed to perform his duties by submitting the required reports and his actions threatened the security of the facility.

² Pharo witnessed a male inmate kiss a female inmate, which is a violation of facility rules.

³ The charges that involved the inmate included gang affiliation and murder charges.

⁴ Pharo used the wrong incident number, wrong inmate name, and failed to name any inmates who would allegedly subject him to retaliation in his report.

In addition, the appointing authority argues that a clear material error occurred in the prior decision, as the Commission failed to distinguish between two types of relevant reports, ignored material facts, treated the incident as mere insubordination, and incorrectly determined that the concept of progressive discipline was applicable to the matter. Specifically, the appointing authority asserts that the Commission failed to distinguish between the disciplinary action report and the incident report. Rather, it states that the Commission only acknowledged in the prior matter that Pharo failed to write the required reports. As such, the appointing authority contends that the Commission failed to recognize that termination was the appropriate penalty, as it did not have a full understanding of the matter. The appointing authority explains that because Pharo witnessed the inmate commit a violation, he was required to complete and submit a disciplinary action report, as such report is used to issue the charges and provide notice to the inmate. The appointing authority adds that the incident report documents any observations and actions taken by County Correctional Police Officers that occurred at the time of a particular incident.

The appointing authority also contends that the Commission erred by concluding that the refusal to write such reports did not jeopardize the safety of the facility, as Pharo's supervisors were aware of his activity. The appointing authority states that it is difficult to comprehend that the severity of the infraction in this matter was minimized in the prior decision, and it appears that the Commission was analogizing it to mean that it is acceptable for an employee to shirk their assigned duties so long as someone else knows that an incident occurred.⁵ The appointing authority adds that the incident was recorded on camera, which Pharo admitted was the reason why he decided to report the matter to a supervisor. As such, the appointing authority argues that it is reasonable to conclude that, if the incident was not recorded on camera, Pharo would not have reported it to a supervisor. The appointing authority contends that there is a risk that the inmate will commit additional infractions given Pharo's failure to hold him accountable. The appointing authority adds that the fact that the inmate was ultimately charged by a superior officer does not alleviate the risk that such refusals to act will result in a disorderly facility.

The appointing authority further asserts that the Commission erred in concluding that the conduct was aberrational and was not a liability to the facility. The appointing authority states that, although Pharo does not have any prior disciplinary history, it also is concerned that he was genuinely afraid of the inmate. It adds that his current willingness to perform his duties appears to be self-serving so that he can be restored to his position. The Commission ignores that Pharo's refusal to perform his duty was not just limited to one day, as he held the ongoing belief that the inmate would harm his family. The appointing authority cannot risk

⁵ The appointing authority contends that it appears that the Commission is acknowledging that it is appropriate to "pass the buck."

the safety of the facility on the self-serving basis that Pharo will complete his duty next time. The appointing authority asserts this matter goes beyond a simple finding of insubordination, but rather, the primary concern is Pharo's inability to perform his duties. As such, the Commission failed to consider the severity of the infraction. Pharo's fears cannot be cured by the 45 working day suspension, and as such, his removal should be effectuated.

Despite being provided with the opportunity, Pharo did not provide a response.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which the Commission may reconsider a prior decision. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding. It is noted that the burden of proof is on the appellant to provide information in support of her case. *See N.J.S.A.* 11A:2-6(b) and *N.J.A.C.* 4A:2-1.4(c).

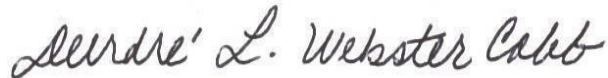
In this matter, the appointing authority has not provided any substantive information to show that a material error occurred or any new information that would somehow change the outcome of the prior matter. In the prior matter, the Commission appropriately determined that the concept of progressive discipline applied, and mitigating factors warranted modifying the removal to a 45 working day suspension. Regarding the appointing authority's argument that the Commission erred by modifying the removal to a 45 working day suspension, the Commission disagrees. Based on the mitigating factors, the record clearly supported modifying the removal to a 45 working day suspension. Although the appointing authority may disagree that the Commission's methodology in the prior matter, it is the Commission that is authorized by Civil Service law and rules to make such determinations. With respect to the appointing authority's argument that it appears that the Commission was suggesting in the prior decision that it was appropriate to "pass the buck," such arguments are misplaced. While the prior decision indicated that the action of notifying a supervisor about the infraction was a mitigating factor, reporting the incident was not the sole mitigating factor considered. In modifying the disciplinary penalty, the Commission considered additional mitigating factors including lack of a prior disciplinary record, no similar circumstances occurred during Pharo's 13 years of employment, and the conduct was aberrational. Moreover, the Commission indicated in the prior matter that the 45 working day penalty was a *serious* penalty and specifically warned Pharo that any future similar conduct will result in a disciplinary penalty up to and including removal. Accordingly, the appointing authority has provided no substantive evidence to disturb the prior decision, and its request for reconsideration is denied.

ORDER

Therefore, it is ordered that this request be denied.

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 30TH DAY OF SEPTEMBER, 2020



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

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Attachment

c: Robert Pharo
Jennifer P. Starr, Esq.
Kelly Glenn
Records Center



STATE OF NEW JERSEY

DECISION OF THE CIVIL SERVICE COMMISSION

In the Matter of Robert Pharo
Atlantic County, Department of Public Safety

CSC DKT. NO. 2020-1263
OAL DKT. NO. CSR 15785-19

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ISSUED: MAY 22, 2020 (NFA)

The appeal of Robert Pharo, County Correction Officer, Atlantic County, Department of Public Safety, removal effective August 28, 2019, on charges, was heard by Administrative Law Judge Kathleen M. Calemmo, who rendered her initial decision on April 14, 2020. No exceptions were filed.

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 20, 2020, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge’s initial decision. However, the Commission did not agree with the ALJ’s recommendation to uphold the removal. Rather, the Commission modified the removal to a 45 working day suspension.

In this case, the only issue is whether the appellant’s misconduct was worthy of removal absent the imposition of progressive discipline. In that regard, in determining the proper penalty, the Commission’s review is de novo. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. West New York v. Bock, 38 N.J. 500 (1962). Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual’s prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980). It is settled that the theory of progressive discipline is not a “fixed and immutable rule to be followed without question.” Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate

notwithstanding a largely unblemished prior record. See *Carter v. Bordentown*, 191 N.J. 474 (2007). Further, even when a law enforcement officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense may nevertheless warrant the penalty of removal where it is likely to undermine the public trust. See *Henry v. Rahway State Prison*, supra, 81 N.J. at 579-80. Where an infraction has not been found to be egregious, the tenets of progressive discipline are generally followed. See *In the Matter of Anthony Stallworth*, 208 N.J. 182 (2011).

In this case, while the appellant's infraction is very serious, the Commission does not find it so egregious as to bypass the imposition of progressive discipline and impose removal. The appellant is clearly guilty of the insubordination and related charges, however, there are mitigating factors that support a lesser penalty. Initially, it cannot be said that the appellant's failure to write the requested report jeopardized the security of the facility since his superiors became aware of the activity the appellant witnessed. While their legitimate concerns that the appellant's professed reasons for not writing the report support severe disciplinary action, it does not establish that his actions were so egregious to bypass progressive discipline. In that regard, the appellant was a 13-year employee and had no prior major discipline. Moreover, all involved agreed that his conduct was aberrational as there were no similar previous incidents, which tends to cut against the Warden's assessment that the appellant's "fear became a liability for the facility." Accordingly, based on the above, the Commission finds that the appropriate penalty in this matter is a 45 working day suspension. This significant suspension in no way minimizes the appellant's misconduct and should serve as a warning that any future infractions would support a disciplinary penalty up to and including removal.

Since the removal has been modified, the appellant is entitled to be reinstated to his position with back pay, benefits and seniority following his suspension until the date of his reinstatement pursuant to *N.J.A.C. 4A:2-2.10*.

Regarding counsel fees, *N.J.A.C. 4A:2-2.12(a)* provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in the disciplinary appeal is the merits of the charges. See *Johnny Walcott v. City of Plainfield*, 282 N.J. Super. 121,128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this matter, while the penalty was modified, charges were sustained, and major discipline was imposed. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as appellant has failed to meet the standard set forth at *N.J.A.C. 4A:2-2.12*, counsel fees must be denied. This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the

penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, unpublished, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. However, under no circumstances should the appellant's reinstatement be delayed based on any dispute regarding back pay.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. Accordingly, the Commission modifies the removal to a 45 working day suspension. Pursuant to *N.J.A.C. 4A:2-2.10*, the appellant is entitled to receive mitigated back pay, benefits and seniority from the conclusion of the 45 working day suspension until the actual date of reinstatement. An affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10*, the parties are encouraged to make a good faith effort to resolve any dispute as to back pay. However, under no circumstances should the appellant's reinstatement be delayed based on any dispute regarding back pay.

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

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R. 2:2-3(a)(2)*. After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF MAY, 2020



Deirdre 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. CSR 15785-19

AGENCY DKT. NO. N/A

**IN THE MATTER OF ROBERT
PHARO, ATLANTIC COUNTY
DEPARTMENT OF PUBLIC SAFETY.**

Katherine D. Hartman, for appellant Robert Pharo (Attorneys Hartman,
Chartered)

Jennifer Starr, Assistant County Counsel, for respondent Atlantic County
Department of Public Safety (James F. Ferguson, County Counsel)

Record Closed: March 5, 2020

Decided: April 14, 2020

BEFORE KATHLEEN M. CALEMMO, ALJ:

STATEMENT OF THE CASE

Appellant Robert Pharo (appellant or Pharo), a corrections officer with respondent Atlantic County Department of Public Safety (respondent or County), appeals from disciplinary action removing him from service. By Final Notice of Disciplinary Action (FNDA), respondent charged Pharo with conduct that violated: N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties; N.J.A.C. 4A:2-2.3(a)(2), insubordination; N.J.A.C. 4A:2-2.3(a)(3), inability to

perform duties; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, including violations of the Policy and Procedure Manual and the Manual of Personnel Rules and Regulations. Pharo does not deny the specification that gave rise to the charges, nor is he denying that discipline was warranted. Pharo is seeking a second chance because his conduct on that day was an aberration that will not be repeated.

PROCEDURAL HISTORY

On October 29, 2019, Pharo filed a Law Enforcement Officer Removal Appeal. On November 4, 2019, his appeal was directly filed simultaneously, with the Civil Service Commission and the Office of Administrative Law (OAL) as a contested case pursuant to the provisions of N.J.S.A. 52:14B-1 through 15 and N.J.S.A. 52:14F-1 through 23, as well as N.J.S.A. 40A:14-202(d). The matter was scheduled for a hearing on December 23, 2019, but adjourned with consent by the parties due to a personal emergency. It was rescheduled for January 3, 2020, but adjourned by Pharo due to a family emergency. By letter dated January 2, 2020, in recognition of his request for an adjournment, Pharo waived the applicability of the 180-Day Rule. N.J.A.C. 4A:2-2.13(g) and N.J.S.A. 40A:14-201(a). The hearing was held on March 5, 2020, and the record closed on that day.

THE SPECIFICATIONS

The County's charges against Pharo arise from the following incident, set forth in the FNDA (R-1):

On August 18, 2019 employee contacted a superior officer and told the superior officer that he witnessed two inmates commit a violation of facility rules. The superior officer ordered employee to prepare a disciplinary report and employee refused to do so out of fear that one of the involved inmates would retaliate against him by going after his family. Employee denied ever being threatened by said inmate and based his explanation on the inmate's criminal history. The superior officer ordered employee multiple times to write the disciplinary reports and employee continued to refuse on the

same basis. When asked why he contacted the superior officer about the incident employee stated that the incident may have been caught on camera and may have been seen. Employee was later ordered by another superior officer to write the disciplinary report and employee refused the orders from that superior as well with the same explanation. Employee was also ordered to write a report explaining what he witnessed and include his basis for refusing to write the disciplinary report. Employee did not follow that order.

Employee willfully and intentionally disobeyed lawful orders by his superiors to perform a core duty of his job as a correction officer. An employee unable and unwilling to perform his duties would be a hazard if permitted to remain on the job and an immediate suspension is necessary to maintain the safety, health, order and effective direction of the justice facility.

FACTUAL DISCUSSION

Testimony

For respondent

Warden David Kelsey (Warden) has spent twenty-two years in law enforcement. He began his career in 1997, as an officer. He started to rise within the chain of command in 2008, when he was promoted to sergeant; in 2012, he was promoted to lieutenant; in 2016, he was promoted to captain; and in 2018, he became the Warden of the Atlantic County Justice Facility.

The Warden reviewed all the reports (R-3 through R-6) and signed the discipline supporting removal (R-1 and R-2). His recommendation of removal was based on a totality of the circumstances. Pharo refused to perform a core task, after witnessing a minor infraction between two inmates. The inmates engaged in unauthorized physical contact when they kissed each other while being escorted from the visiting area. Pharo

was ordered by a superior officer to write a report about what he witnessed. He refused, stating that he feared retaliation from the male inmate.

The ramifications of Pharo's refusal to write a report and charge the inmate with a minor infraction was significant. An officer's unwillingness to charge an inmate with a minor infraction could lead to chaos and embolden the inmate to take even greater liberties with the rules.

Pharo was given numerous opportunities by his sergeant to write the report and charge the inmates; each time he refused. He remained adamant about not charging the inmate because of fear of retaliation and the need to protect his family. The Warden expressed even greater concern when Pharo admitted that he only came forward about the incident because he believed it was caught on camera and would become known. After refusing repeated orders to charge the inmates, Pharo replied that he would take the discipline.

The Warden testified that Pharo is a thirteen-year veteran and his behavior was not consistent with his level of experience or his past performance. This facility houses minimum, medium, and maximum offenders; some of which have committed violent heinous crimes. This inmate was detained for a murder charge and he is known to be involved in gang activity. Pharo denied being threatened by the inmate; he was just afraid to charge him. In this environment, fear and nerves are common but the officer cannot allow his feelings to interfere with his duty.

Why not offer Pharo a second chance? The Warden stated that he is responsible for the safety and security of everyone in the facility. Pharo's response to this minor incident convinced him that Pharo was too fearful to do his job. In this instance, the Warden believed that the inmate expected to be charged. He committed a blatant act by kissing another inmate directly in front of Pharo. If there were no charge against this inmate for his action, it could lead to chaos. Strict order and discipline are required in the facility. If an inmate believed he could get away with a minor infraction, he may become

embolden to commit more serious infractions. Even worse, the inmate could use his perceived power to manipulate the officer. For these reasons, the Warden felt it was important for officers to always hold an inmate accountable when a rule is broken.

On cross-examination, the Warden stated that termination was appropriate because of Pharo's fear. Pharo was willing to disobey multiple direct orders because he was afraid of an inmate's potential for retaliation. The Warden lost confidence in Pharo's ability to do his duty. He did not believe a suspension would correct this behavior.

In the thirteen years that the Warden knew Pharo there was no insubordination and no prior concerns about Pharo's ability to do the job. Warden did not order a fitness for duty evaluation.

Warden agreed that personal stress could cause aberrational behavior. However, he was not aware of anything affecting Pharo's personal life during this time.

In this case, the charges against the inmate were filed, but by another officer. The Warden knew of no evidence that the inmate was ever aware that Pharo had been afraid to charge him.

For appellant

Robert Pharo was a thirteen-year veteran at the County Justice Facility, who started at the facility in October 2016. He has been married for five years and has a five-year-old son.

At the time of the incident, Pharo and his wife were having marital difficulties. She had threatened to leave him and take their son with her. This situation overwhelmed him. He felt he had to do everything in his power to save his marriage and keep his family intact.

On August 18, 2018, he saw the inmate kiss his girlfriend, who was also an inmate. Although it was consensual, it was still unauthorized contact; he should have charged both inmates. Previously, he would not have thought twice about charging this infraction or any infraction, major or minor. Pharo knew that this inmate was incarcerated on murder charges and he had gang affiliations. Because of what was happening at home, Pharo feared that the inmate would threaten his family. He wanted to keep his family safe and not give his wife any cause to leave him and take their child.

He realized that his thinking was irrational. After this incident, he went to counseling and it helped him to communicate with his wife and manage his stress. Unfortunately, with losing his job, he also lost his health insurance, so he stopped going to counselling. However, he continues to exercise and be mindful about communication. Employing these strategies has really helped him.

He knows that he can do his job and perform all his duties. If given the chance, he would continue with counselling. This incident was shocking, even to him. It was out of character and it will never happen again.

On cross-examination, Pharo stated that even if his marriage took a negative turn, he would handle things differently. He had been completely consumed by his personal life and allowed it to affect his job. He was trying to separate home and work and pretend that everything was normal, when it was not.

When Pharo finally wrote his report, he wrote the wrong report number, wrong date, and incorrectly identified the suspect. In the body of the report, he only listed the female inmate's name and never mentioned the male inmate by name. (R-5.)

FINDINGS

The incident as described on the specifications attached to the FNDA (R-1) was not disputed by Pharo. The Warden's responsibility was to review the investigation of the

incident and recommend appropriate discipline. The Warden testified in a straightforward, credible manner and showed no signs of bias or animosity against Pharo. He was motivated to do his duty and act in the best interest of the facility. I accept the Warden's unrefuted testimony that Pharo allowed his fear of an inmate to compromise his duty.

The essential facts that gave rise to the charges against Pharo are undisputed and I FIND them as FACT.

LEGAL DISCUSSION AND CONCLUSION

Pharo'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).

Pharo'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). It is well recognized that correctional facilities operate through a rigidly hierarchical, almost "paramilitary," structure. Lockley v. Dep't of Corr., 177 N.J. 413, 425 (2003).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

The County charged Pharo with violating the following:

N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty

Neglect of Duty can arise from an omission or failure to perform a duty as well as negligence. Generally, the term “neglect” connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). “Duty” signifies conformance to “the legal standard of reasonable conduct in the light of the apparent risk.” Wytupeck v. Camden, 25 N.J. 450, 461 (1957). Neglect of duty can arise from omission to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Although the term “neglect of duty” is not defined in the New Jersey Administrative Code, the charge has been interpreted to mean that an employee has neglected to perform and act as required by his or her job title or was negligent in its discharge. Avanti v. Dep’t of Military and Veterans Affairs, 97 N.J.A.R. 2d (CSV) 564; Ruggiero v. Jackson Twp. Dep’t of Law and Safety, 92 N.J.A.R. 2d (CSV) 214.

Pharo neglected his duty when he failed to charge the inmates with committing a minor infraction. Pharo neglected his duty when he deliberately failed to obey a lawful order given by a superior officer. Pharo neglected his duty when he deliberately falsified the report to protect the identity of the inmate.

Therefore, I **CONCLUDE** that Pharo’s behavior constituted neglect of duty, in violation of N.J.A.C. 4A:2-2.3(a)(7). I **CONCLUDE** that the County has met its burden of proof on this issue.

N.J.A.C.4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties

Pharo witnessed a blatant infraction of the rules and let fear and irrational thinking guide his actions instead of performing his duties. For the reasons expressed above, I **CONCLUDE** that Pharo's behavior constituted a level of incompetency, inefficiency, and

failure to perform duties, in violation of N.J.A.C.4A:2-2.3(a)(1). I **CONCLUDE** that the County has met its burden of proof on this issue.

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

Insubordination can be defined as intentional disobedience or refusal to accept reasonable orders, assaulting or resisting authority, disrespect or use of insulting or abusive language to a supervisor. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971). Pharo was insubordinate when he refused direct orders to write the charges. Additionally, he was insubordinate when he falsified the report about the incident. (R-3 and R-4.) Pharo completed a report that had the wrong report number, wrong inmate's name, and wrong date. (R-5.) He failed to include any information in his report explaining why he refused to charge the inmates. Pharo signed the report indicating that it was true and accurate when he knew it was not.

Therefore, I **CONCLUDE** that Pharo's behavior constituted insubordination, in violation of N.J.A.C. 4A:2-2.3(a)(2). I **CONCLUDE** that the County has met its burden of proof on this issue.

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

This charge is 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. The 'other sufficient cause' set forth in the preliminary and final notices of discipline are for violations of the County's Policy and Procedure Manual and Manual of Personnel Rules and Regulation.

The County charged Pharo with violating the following rules relating to professional conduct:

01.05: Responsibilities

Under this section, Pharo was required to take appropriate action to prevent crimes within the institution. Pharo refused to charge an inmate who committed a blatant infraction right in front of him.

01.07: Neglect of Duty; 01.08 Performance of Duty; 01.10: Insubordination; and 01.11: Obedience to Laws, Department Rule, Policy, or Regulation

The above rule violations arise from the same facts and are subsumed in the charged violations under N.J.A.C. 4A:2-2.3(a)(1-3) and (7).

As detailed above, Pharo's conduct was such that he violated this standard of good behavior. As such, I **CONCLUDE** that the County 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).

I further **CONCLUDE** that all charges brought herein against Pharo are **SUSTAINED**.

PENALTY

The next question is the appropriate level of 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).

Pharo had no prior major discipline in his thirteen years with the facility. Notwithstanding that this was Pharo's first major discipline, the County relied principally on the Warden's determination that Pharo's fear became a liability for the facility. The Warden further determined that Pharo's fear prevented him from performing his duty. Pharo had numerous opportunities to comply and each time he refused. Under the totality of the circumstances, the Warden asserted that progressive discipline was not warranted, and that termination was the only appropriate discipline.

Here, Pharo is seeking a second chance; he does not dispute his conduct. Pharo believes that his conduct was aberrational to his nature and that it was caused by his failure to adequately address his marital problems. He promised that it would not happen again.

The aggravating factors are significant. Pharo witnessed a blatant violation that was minor in nature. He chose to ignore the violation because he believed that in doing so he was protecting himself and his family from a possible retaliation. When confronted and ordered to charge the inmate, he refused multiple direct orders. When ordered to write a report, he complied but falsified its contents. This behavior undermines the safety and security of the facility.

Having weighed the aggravating and mitigating factors and the proofs presented, I **CONCLUDE** that the County's action of removing Pharo from his position was appropriate and should be **AFFIRMED**.

DECISION AND ORDER


Respondent has proven by a preponderance of credible evidence the following charges against Pharo: N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties; N.J.A.C. 4A:2-2.3(a)(2), insubordination; N.J.A.C. 4A:2-2.3(a)(3), inability to perform duties; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, including violations of the County's Policy and Procedure Manual: 01.05, 01.07, 01.08, 01.10, and 01.11. Accordingly, I **ORDER** that these charges be and are hereby **SUSTAINED**. Furthermore, I **ORDER** that the penalty of removal 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 14, 2020
DATE

KATHLEEN M. CALEMNO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

KMC/tat

APPENDIX
LIST OF WITNESSES

For Appellant:

Robert Pharo

For Respondent:

Warden David Kelsey

LIST OF EXHIBITS

For Appellant:

None

For Respondent:

- R-1 FNDA with attachments
- R-2 PNDA with attachments
- R-3 Report number 19080456, date written 8/22/2019
- R-4 Report number 19080456, date written 8/19/2019
- R-5 Pharo's report
- R-6 Report number 19080456, date written 9/3/2019
- R-7 Rules of Professional Conduct
- R-8 Policies and Procedures
- R-9 Inmate Violations
- R-10 Disciplinary History