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Lt. Governor

STATE OF NEW JERSEY
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October 13, 2021

Arthur Murray, Esq.
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8 South Maple Avenue
Marlton, NJ 08053

Elizabeth Davies, DAG
Law and Public Safety
P O Box 112
Trenton, NJ 08625-112

Re: *In the Matter of Timothy Firrman, Garden State Youth Correctional Facility*
(CSC Docket No. 2021-1073 and OAL Docket No. CSR 03339-21)

Dear Mr. Murray and DAG Davies:

The appeal of Timothy Firrman, a Senior Correctional Police Officer with the Garden State Youth Correctional Facility, Department of Corrections, of his removal, on charges, was before Administrative Law Judge David J. Fritch (ALJ), who rendered his initial decision on September 1, 2021, recommending modifying the removal to a six-month suspension. Exceptions and reply exceptions were filed by the parties.

The matter came before the Civil Service Commission (Commission) at its October 6, 2021 meeting. Currently, only four members constitute the Commission. A motion was made to uphold the removal. Two Commission members voted for this motion while the remaining two members voted to adopt the ALJ's recommendation in full. Since there was a tie vote, the motion was defeated and no decision was rendered by the Commission. Henry M. Robert, Sarah Corbin Robert, Henry M. Robert III, William J. Evans, Daniel H. Honemann, and Thomas J. Balch, *Robert's Rules of Order, Newly Revised*, Tenth Edition, October 2000, Da Capo Press, Perseus Book Group, Chapter 2, Section 4, p. 51. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter. *N.J.S.A.* 52:14B-10(c). Any further review should be pursued in a judicial forum.

Since the appellant's removal has been modified, the appellant is entitled to back pay, benefits and seniority for the period following the six-month suspension until he is reinstated. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. As major disciplinary action was imposed, the appellant is not entitled to counsel fees. Proof of income earned and an affidavit of

mitigation should be submitted to the appointing authority within 30 days of said reinstatement. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

Sincerely,

Allison Chris Myers
Allison Chris Myers
Director

Attachment

c: The Honorable David M. Fritch, ALJ
Division of Agency Services
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 03339-21
AGENCY DKT. NO. N/A
2021-1073

IN THE MATTER OF TIMOTHY FIRRMAN, GARDEN STATE YOUTH CORRECTIONAL FACILITY, NEW JERSEY DEPARTMENT OF CORRECTIONS.

Arthur Murray, Esq., for appellant (Alterman & Associates, LLC, attorneys)

Elizabeth Davies, Deputy Attorney General, for respondent (Andrew J. Bruck, Acting Attorney General of New Jersey, attorney)

Record Closed: August 9, 2021 Decided: September 1, 2021

BEFORE **DAVID M. FRITCH**, ALJ:

STATEMENT OF THE CASE

Senior Corrections Officer Timothy Firrman (appellant) appeals the decision of the New Jersey Department of Corrections (DOC), Garden State Youth Correctional Facility (GSYCF or respondent) to impose a penalty of dismissal for charges of neglect of duty and violation of administrative procedures and/or regulations involving safety and security. The appellant concedes the charges of violation of administrative

procedures and/or regulations but challenges the allegation of neglect of duty and the penalty imposed.

PROCEDURAL HISTORY

The DOC issued a Preliminary Notice of Disciplinary Action (PNDA) dated March 27, 2020, notifying the appellant of the charges against him. (R-1.) After a departmental hearing held on December 22, 2020, DOC sustained the following charges which were incorporated into a Final Notice of Disciplinary Action (FNDA) dated January 26, 2021, with a proposed penalty of removal: N.J.A.C. 4A:2-2.3(a)(7), neglect of duty, N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, DOC Human Resources Bulletin (HRB) 84-17 §§ B-2, neglect of duty, D-7, violation of administrative procedures and/or regulations involving safety and security, and E-1, violation of a rule, regulation, policy, procedure, order, or administrative decision.

The appellant timely requested a hearing on these charges and the matter was transferred to the Office of Administrative Law (OAL), where it was filed on April 1, 2021, to be heard as a contested case. N.J.S.A. 52-14B-1 to -15 and 14F-1 to -13. On June 21, 2021, the appellant, through counsel, formally withdrew his "not guilty" plea and entered a plea of guilty to the contested charges of violations of N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, HRB 84-17 §§ D-7, violation of administrative procedures and/or regulations involving safety and security, and E-1, violation of a rule, regulation, policy procedure, order, or administrative decision. The matter was heard on the remaining contested charges on June 29, 2021, via the Zoom video-conferencing platform. The record remained open for the parties to provide post-hearing submissions and closed on August 9, 2021.

TESTIMONY AND FACTUAL DISCUSSION

Based upon the testimony and documentary evidence, and having had the opportunity to observe the appearance and demeanor of the witnesses, I **FIND** the following **FACTS** are uncontested on this record:

1. The appellant has been employed by the New Jersey Department of Corrections (NJDOC) since November 2017. (App. Br. at 7 at ¶ 38.) The appellant attended the Police Academy for Correctional Police Officers from November 2017 through March 2018. (Ibid.)

2. On February 10, 2020, the appellant was a Senior Correctional Police Officer[1] assigned to work the 7:00 a.m. through 3:00 p.m. shift at the Garden State Youth Correctional Facility (GSYCF).

a. The appellant usually worked a 6:00 a.m. through 2:00 p.m. shift, however, he was scheduled to work Assignment by Operations (ASOP) that day which meant he was expected to fill in wherever the facility needed him to work that day. (Tr. at 150:8-151:11.)

b. The appellant was notified the night before of the time change in his February 10, 2020, shift. (Id. at 151:12-25.)

c. The appellant was assigned to work Inside Sanitation, where his duty was to supervise a group of inmates as they went through the facility performing cleaning tasks. (Id. at 152:3-154:3.) This assignment was inside the secure perimeter of the GSYCF. The appellant, in his testimony, described the secure perimeter as "anything behind that gate in the front" at GSYCF. (Id. at 155:10-21.)

3. Prior to starting his shift on February 10, 2020, the appellant went to the gym. After his workout, the appellant dressed in his uniform to report for his shift at GSYCF. While dressing, he put his Apple Series 4 Watch[2] (Apple Watch) in the pocket of his uniform jacket at the gym.

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[1] Pursuant to N.J.S.A. 11A:2-11.1, Senior Correction Officers are now titled Senior Correctional Police Officers, effective May 1, 2018.

[2] The Apple Watch Series 4 is a "smart watch" made by Apple Inc. which has features including communication features that allow a user to communicate "around the world over Wi-Fi or cellular" networks. See Apple, Inc., Press Release, Apple Watch Series 4: Beautifully redesigned with breakthrough communication, fitness and health capabilities, September 12, 2018, available at

4. When the appellant arrived at GSYCF for his shift, he wasn't wearing his Apple Watch on his wrist, it remained in the pocket of his uniform jacket. He removed his jacket and placed it on the x-ray machine and went through the required security check as he entered GSYCF that morning. Staff at the ingress point at GSYCF did not stop him or detect the presence of his Apple Watch in his jacket pocket that morning.

5. The appellant testified that the Apple Watch was in his jacket pocket and he brought it with him through the secure perimeter of GSYCF that morning. (Tr. at 159:19–23 (appellant's testimony that it "slipped his mind" to leave his Apple Watch in the car before entering the facility the morning of February 10, 2021).) The appellant acknowledged that this was a "terrible mistake" and "poor judgement" on his part. (Tr. at 40:15-17; Id. at 40:4; Id. at 48:9; Id. at 165:13. See also Tr. at 40:3-5 (appellant's March 24, 2020, interview (R-19) where appellant acknowledges his conduct on February 10, 2020, was a "judgement mistake, poor judgement mistake on – on my part").)

a. The appellant normally wears a regular watch at work. He has never worn his Apple Watch at work other than on February 10, 2020. (Tr. at 160:1-6.)

6. Communication devices, such as cellular phones, are not permitted inside the secure perimeter at GSYCF. There are specific signs at the ingress point to GSYCF to warn individuals going through security as they enter the facility that these devices are not permitted inside. (See R-7.)

7. After the appellant passed through security at GSYCF, he reported to his post. At that point, he reached into his jacket pocket and discovered that he had his Apple Watch in his jacket pocket. The appellant conceded that he was then aware that he had violated DOC policy by bringing the Apple Watch inside the secure perimeter at GSYCF. (Tr. at 160:7-11.)

a. The appellant knew from his training at the Academy that he cannot bring an electronic communication device with him inside GSYCF. (Tr. at 160:20-23. See

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https://www.apple.com/newsroom/2018/09/redesigned-apple-watch-series-4-revolutionizes-communication-fitness-and-health/ (last visited July 8, 2021).

R-16 (acknowledging appellant's receipt of DOC policies, including DOC policy PSM.001.017 prohibiting electronic communication devices inside DOC correctional facilities). See also R-9 (DOC Policy PSM.001.017).)

b. The appellant does not deny his actions of bringing an Apple Watch inside the secure perimeter of GSYCF on February 10, 2020, violated DOC policy. (See App. Br. at 17.)

8. DOC policy specifically addresses "the security threat posed to the New Jersey Department of Corrections, its employees and the public at large by the introduction of electronic communication devices into secured perimeters." (R-9.) This policy prohibits the possession of electronic devices by "any person entering into the secured perimeter of any correctional facility." (Id.) DOC policy defines electronic communication devices as:

> [A] device or related equipment or peripheral or part of component of such device, equipment or peripheral that is capable of electronically receiving, transmitting or storing a message, image or data. Examples of such electronic devices include, but are not limited to, all types and sizes of a computer, telephone, two-way radio, camera, or video/audio player/recorder, fax machine, personal data assistant, hand-held e-mail system, device/ component/peripheral batteries and chargers and related equipment, blue-tooth [sic] devices, polygraph equipment (as employed for use by NJFOC Special Investigations Division) or any other device containing a means of internet access or receiving, transmitting or storing information electronically by means of audio, video, or recorded data.
>
> [Id.]

9. The General Post Order for GSYCF also prohibits "personal electronic devices, such as cell phones, I-pods, I-pads, laptops, mp3 players, etc." from being "on any post without prior approval of the administrator." (R-10.)

10. The appellant's Apple Watch was a prohibited electronic communication device within the meaning of DOC policy PSM.001.017 (R-9), and a prohibited personal electronic device within the meaning of GSYCF's General Post Order G.S. 101. (R-10.)

11. In his testimony, the appellant acknowledged that he could have asked a superior to be relieved of his post to allow him to return to his car, leave the Apple Watch secured there, and return to work that day—but he did not, attributing this to his "just not clear thinking" that day. (Tr. at 41:7-20.) See also Id. at 41:8-9 (appellant's March 24, 2020, interview (R-19) where appellant acknowledges he "should have gotten relieved and put it out in my car" when he realized he had his Apple Watch with him).)

a. This was confirmed through the testimony of Correctional Police Sergeant Tara Kelly, who testified that the appellant should have notified his sergeant as soon as he realized he was in possession of the Apple Watch inside the secure perimeter at GSYCF. (Tr. at 200:21-201:15.) This would have allowed the appellant the opportunity to remove the device from the secure perimeter. (Id.)

12. The appellant removed his Apple Watch from his jacket pocket and placed it on his wrist. During his shift, the Apple Watch remained on his wrist and was turned on.

a. The appellant testified that he put the Apple Watch on his wrist to keep it on his person at all times. (Tr. at 161:9.) He explained that he did not want to leave the Apple Watch in his jacket pocket because his jacket was left in his office and inmates sometimes go into his office and could possibly get access to the device in there. (Id. at 161:2-9; Id. at 161:19-23.)

b. The appellant also testified, however, that his grandmother had just been admitted to the hospital, his fiancé was having other personal issues that day (Tr. at 163:1-17), and the Apple Watch allowed him to keep in touch with his family throughout his shift. (Tr. at 178:6-12 (appellant's testimony noting that having the watch with him during his shift allowed him to maintain his "connection to [the] outside".) He testified that his mind was on the safety/security of his family that day (id. at 163:11-12, id. at 165:14-15) and having the watch with him gave him "comfort" even if that comfort "came with the cost of jeopardizing the – the policy and procedure of my job." (Id. at 163:11-22.) He had hoped to get through his shift and return the Apple Watch to his car at the end of his shift. (Id. at 164:7-11.)

c. During his shift on February 10, 2020, the appellant sent or received approximately forty-five text messages communicating back and forth with his fiancé. (R-2 (detailing text messages on the Apple Watch).)

13. Maria Jackson, a Senior Investigator with DOC's Special Investigations Division (SID) was working at GSYCF on February 10, 2020.

14. Jackson had to interview an inmate at GSYCF on February 10, 2020, and wanted to utilize a room in the facility that was locked. She found the appellant and asked him to unlock the door to the room she sought to utilize.

15. When the appellant reached for the door to unlock it for her, Jackson noted the Apple Watch on his wrist and saw a text message had come through on the watch.

16. Recognizing that the appellant was wearing an Apple Watch inside the secure perimeter of GSYCF, Jackson notified her chain of command and escorted the appellant to the SID office at GSYCF.

17. Dominick Puzio, a Senior Investigator with SID met the appellant at the SID office at GSYCF on February 10, 2020. The appellant surrendered his Apple Watch to the investigating SID officers and the watch was sent to DOC's Technical Services Unit. The appellant also gave the investigating SID officers the passcode for his Apple Watch so that DOC's Technical Services Unit could access the device's content.

18. DOC's Technical Services Unit was able to recover the text messages exchanged between the appellant and his fiancé on February 10, 2020. (R-2.) These recovered messages confirmed that the appellant exchanged approximately forty-five text messages with his fiancé utilizing his Apple Watch during his shift at GSYCF on February 10, 2020. (Id.) A sampling of the downloaded messages exchanged on the appellant's Apple Watch from the first hour and a half on his shift that morning is as follows:

Fiancé	7:18 a.m.	I just left so late.
Appellant	7:25 a.m.	Ok babe just drive safe. Not a big deal sometimes people are late.

Fiancé	7:26 a.m.	I wish I could have this truck if I can't have a suburban of Tahoe.
Appellant	7:33 a.m.	I know babe. So let's see what they say.
Fiancé	7:39 a.m.	At day care.
Appellant	7:56 a.m.	At Work.
Fiancé	8:01 a.m.	They have to switch out the truck.
Fiancé	8:07 a.m.	I'm going to Enterprise now.
Appellant	8:16 a.m.	You should've had them come to you to switch it out.
Fiancé	8:20 a.m.	They are giving me a suburban.
Fiancé	8:23 a.m.	I wish I could keep this.
Appellant	8:23 a.m.	Keep the Durango.
Appellant	8:30 a.m.	Yeah but now you know you like it.

[Id.]

19. On March 24, 2020, the appellant was interviewed by SID investigators. (R-19.) During his video-recorded interview, the appellant never denied he had violated the facility rules and regulations and cooperated with the investigators in their investigation. (Id.) In this interview, the appellant further acknowledged that having an electronic communications device like his Apple Watch inside the security perimeter that day was a "terrible mistake" and that he "should have gotten relieved and brought it back to my car" once he realized he had it with him inside the security perimeter at GSYCCF. (Id.; Tr. at 40:15-41:9; Id. at 43:17-25.)

These factual findings are supported by a residuum of legal and competent evidence in the record.

LEGAL ANALYSIS AND DISCUSSION

A civil service employee's rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12.6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit

appointment and broad tenure protection. See Essex Council Number 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this State is to provide public officials with appropriate appointment, supervisory and other personnel authority in order that they may properly execute their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). A public employee who is thus protected by the provisions of the Civil Service Act may nonetheless be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are enumerated in N.J.A.C. 4A:2-2.3.

In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987); N.J.S.A. 11A:2.21; N.J.A.C. 4A:2-1.4(a). The authority must show by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). An appeal requires the OAL to conduct a de novo hearing and to determine the appellant's guilt or innocence, as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987); Cliff v. Morris County Bd. of Social Serv., 197 N.J. Super. 307 (App. Div. 1984).

The appellant's status as a corrections officer subjects him to a higher standard of conduct than ordinary public employees since corrections officers, like police, are held to a high standard of professional conduct because when a corrections officer fails in their duties, they may imperil others. Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980). Township of Moorestown v. Armstrong, 89 N.J.Super. 560, 566 (App. Div. 1965). 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. 317 (App. Div. 1967). Strict discipline of corrections officers is necessary for the safety and security of other corrections officers and the inmates in their charge.

Henry, 81 N.J. at 578. As the Appellate Division explained, this higher standard of conduct and behavior is necessary because:

> 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."
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> [Bowden v. Bayside State Prison, 268 N.J.Super. 301, 306 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).]

Prior to commencement of the hearing in this matter, the appellant stipulated that his conduct on February 10, 2020, violated N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, HRB 84-17 §§ D-7, violation of administrative procedures and/or regulations involving safety and security, and E-1, violation of a rule, regulation, policy, procedure, order, or administrative decision. (See App. Br. at 17.) The only remaining contested charges from the appellant's FNDA dated January 26, 2021, are charges of Neglect of Duty in violation of N.J.A.C. 4A:2-2.3(a)(7) and HRB § 84-17 (B-2).

While the New Jersey Administrative Code does not specifically define "neglect of duty" under N.J.A.C. 4A:2-2.3(a)(7), it generally means that a person is not performing his or her job. In the Matter of Maurice Jackson, Mercer County Corrections Center, CSV 03296-18, Initial Decision (June 26, 2019), adopted, Merit System Board (July 31, 2019) http://lawlibrary.rutgers.edu/oal/search.html. Neglect of duty can arise from an omission or failure to perform a duty and includes official misconduct or misdoing, as well as negligence. Generally, the term "negligent" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). Neglect of duty implies nonperformance of some official duty imposed upon a public employee, not merely commission of an imprudent act. Rushin v. Bd. Of Child Welfare, 65 N.J. Super. 504, 515 (App. Div. 1961).

The appellant does not deny that his conduct on February 10, 2020, violated DOC regulations prohibiting persons from bringing electronic devices inside the secure

perimeter of GSYCF. (See R-9 (DOC Policy PSM.001.017 stating "the policy of the NJDOC is that electronic communication devices shall not be permitted to be possessed by any person entering into the secured perimeter of any correctional facility"); R-14 at Article IV, § 7 (DOC Law Enforcement Personnel Rules and Regulations stating "[n]o officer shall use or possess any electronic communication device in the secured perimeter or other designated areas of a correctional facility"); R-10 (GSYCF Post Orders prohibiting custody staff from having any form of "personal electronic devices, such as cell phones, I-pods, laptops, mp3 players, etc." on post without prior approval of the Administrator).) Bringing a functional and cellular-network connected Apple Watch with him into the secured perimeter of GSYCF violated DOC policy and undermined the security of the facility where the appellant worked. As the Appellate Division summarized, there is a cognizable public safety concern in having such devices inside the secure perimeter of a correctional institution:

> [P]ersonal computers and cell phones are not permitted because they are likely to compromise security and the therapeutic environment. Cell phones and personal computers are contraband in a secure facility because of their ability to receive, transmit, or store data. Computers and cell phones are easily used to store and view data that may include pornographic pictures and/or videos. Furthermore, cell phones and personal computers are capable of accessing the [I]nternet, both through wireless and hard lines. The Department believes that access to the [I]nternet would open the door for residents to prey on unsuspecting victims and would therefore be a public safety concern.

Manasco v. New Jersey Dep't of Corrections, Dkt. No. A-3588-08T3, 2010 N.J. Super. Unpub. LEXIS 3103, *4-6 (App. Div. Dec. 27, 2010). See also N.J.A.C. 10A:1-2.2 (designating "electronic communication devices" as contraband inside NJ correctional facilities).

The appellant, however, contends that his bringing his Apple Watch through the security perimeter at GCYCF the morning of February 10, 2020, was an "imprudent act" and not neglect of duty. (App. Br. at 16.) The extent of the conduct at issue here,

however, extends beyond the appellant bringing the Apple Watch to work with him through the security perimeter that morning. While the appellant maintained that bringing the watch with him was an inadvertent mistake (App. Br. at 8, ¶ 48 (characterizing appellant bringing watch into GCYCF as doing so "inadvertently")), he concedes that, once he discovered the Apple Watch in his jacket pocket when he reported to his post that morning (id. at ¶ 50), he was aware that his possession of the Apple Watch inside the security perimeter was a violation of DOC guidelines. (Id. at 9, ¶ 54. Tr. at 160:7-11. Id. at 38:17-25 (appellant's March 24, 2020, interview (R-19) where appellant acknowledges he was aware that the Apple Watch was considered "contraband" inside the security perimeter of GCYCF and having it was a "violation of the rules and regulations").) Despite realizing his error, the appellant did not "self-report himself" and "did not want to tell on himself for a mistake that he made" by alerting his chain of command of the violation and allowing them to give him the opportunity to correct this security violation. (App. Br. at 9, ¶¶ 54-55. See also Tr. at 160:12-23 (appellant's testimony acknowledging he "didn't self report myself at the time because typically once you find something that you're not supposed to have I kind of panicked and got nervous").)

The DOC rules and regulations which governed the appellant's conduct, however, required him to promptly report "all crimes, misconduct, or unusual incidents which come to the offer's attention during the performance of duty" to his chain of command. (R-14, Article II, § 6 (DOC Law Enforcement Personnel Rules and Regulations).) The appellant was under an affirmative duty to "promptly report" his discovery that he was in possession of an Apple Watch inside the security perimeter of GSYCF once he discovered it in his jacket pocket and take action to correct the situation at hand (id. at § 5) but he failed to do so. (Tr. at 165:18-19 (appellant's testimony conceding that he "should have done the right thing and reported myself when I found the watch in my possession").)

The appellant, in his testimony, acknowledged that he could have asked a superior to be relieved of his post to allow him to return to his car, leave the Apple Watch secured there, and return to work that day—but he did not, attributing this failure

to act to his "just not clear thinking" that day. (Tr. at 41:8-20. See also Id. at 41:8-9 (appellant's March 24, 2020, interview with SID (R-19) where he acknowledges that he "should have gotten relieved and put it out my car" once he realized he had his Apple Watch with him at work on February 10, 2020).) The testimony of Correctional Police Sergeant Tara Kelly, confirmed that the appellant should have notified his sergeant as soon as he realized he was in possession of the Apple Watch inside the secure perimeter at GSYCF to give the appellant the opportunity to remove the device from the secure perimeter. (Tr. at 200:21-201:15.) The appellant could have and should have taken action to address the security situation he created by bringing his Apple Watch inside the secure perimeter at GSYCF on February 10, 2020, once he discovered the watch in his jacket pocket, but he did not do so. As the DOC rules and regulations for law enforcement personnel note, "[f]ailure to take action when the situation requires it constitutes neglect of duty." (Id. at § 5.) Accordingly, I **CONCLUDE** that the respondent has met its burden of proof to sustain the charges of Neglect of Duty in violation of N.J.A.C. 4A:2-2.3(a)(7) and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, for violating HRB § 84-17 (B-2) for the appellant's failure to report the security violation he created when he discovered he had brought his Apple Watch inside the secure perimeter of GSYCF on February 10, 2020.

Although the appellant's failure to take action to correct his mistake in bringing his Apple Watch to work with him inside the secure perimeter of GSYCF on February 10, 2020, without more, is sufficient to sustain the contested charges, the appellant's subsequent conduct after he discovered he was still in possession of his Apple Watch when he reported for duty on February 10, 2020, also requires examination. In addition to not reporting his mistake of bringing the Apple Watch into the secured perimeter of GSYCF with him the morning of February 10, 2020, to his chain of command to permit him to address the security breach his actions created that morning, the appellant further kept the watch on his person, powered on and connected to the cellular network, and proceeded to engage in extensive back-and-forth text communications with his fiancé throughout his shift. (See R-2.)

The DOC regulations that governed the appellant's conduct on February 10, 2020, required him to "devote [his] full attention to [his] assignments." (R-14 at Article II, § 3.) The General Post Orders which applied to the appellant's conduct that day further required him to "remain vigilant at all times." (R-10.) This need for vigilance and attentiveness while on duty is further reflected in other applicable regulations for the facility where the appellant worked which require officers, such as the appellant, to avoid distractions on the job, such as "refrain[ing] from engaging in activities such as reading books, magazines, or newspapers" on duty and prohibits distractions such as "cell phones, I-Pods, laptops, MP3 players, etc." on any post. (R-9 (General Post Order GS.101).) As Major Paldino testified, attention to duty is crucial in these positions because "it could be life and death inside this facility." (Tr. at 107:15-16.)

On February 10, 2020, the appellant was working the Inmate Sanitation Detail at GSYCF. This detail required the appellant to supervise inmates as they moved throughout the facility performing cleaning tasks, emptying trash, etc. Inmates performing these tasks require careful supervision to ensure that they perform the required tasks, and do not take unauthorized items such as a discarded pen with them back to their cell which could, conceivably, be turned into a deadly weapon in the hands of the wrong person. (See Tr. at 34:1-3 (appellant's March 24, 2020, interview (R-19) where appellant acknowledges part of his job on sanitation detail is to ensure the inmates are "not taking anything from the civilians" as they perform their cleaning tasks throughout the facility); Id. at 139:8-140:1). As Major Ronald Paldino testified, the appellant was responsible for the safety and security of GSYCF, and that is not a job that can be done while a person is on the phone or texting on their watch. (Tr. at 107:7-12 (noting that officers cannot maintain safety and security of "not only of staff and civilian staff and visitors, but also of the inmate population" if they are "attending to whatever business he's attending to while he's using an unauthorized communication device.") Despite the obvious need for the appellant to be vigilant and attentive to his duties on February 10, 2020, the appellant himself admitted that his mind was on the safety/security of his family and not on the duties he was assigned at GSYCF that day. (Tr. at 183:9-11 (appellant's testimony that his mind "was already still on—on home life and then not on the job" on February 10, 2020).)

The appellant's documented conduct of engaging in extensive test message communications with his fiancé that day while on duty at GSYCF further supports this conclusion. (See R-2 (documenting approximately forty-five text messages from appellant's Apple Watch communicating back and forth with his fiancé between 7:18 a.m. and 2:36 p.m. on February 10, 2020).) Rather than turn the device off, or even place the device into "airplane mode"[3] to avoid receiving distracting text messages and other networked communications on the device, the appellant kept the device on his person throughout his shift, connected to an outside communications network, and utilized it to send and receive communications with his fiancé during working hours. (See R-2.)

In the first two hours of his shift that day, it is documented that the appellant exchanged nineteen text messages with his fiancé (see R-2), meaning he was either reading an incoming message from or composing a new message to his fiancé approximately once every six minutes of the first two hours of his shift. I **CONCLUDE** that this documented inattention to his assigned duties at GSYCF on February 10, 2020, constitutes a neglect of the appellant's duty, and the respondent has further met its burden of proof to sustain the charges of Neglect of Duty in violation of N.J.A.C. 4A:2-2.3(a)(7) and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, for violating HRB § 84-17 (B-2) for the appellant's inattention to his duties as shown by his extensive text message communications throughout his shift at GSYCF on February 10, 2020. (See R-14 at Article II, § 3; R-9, and R-10.) See also In the Matter of Maurice Jackson, Mercer County Corrections Center, CSV 03296-18, Initial Decision, (June 26, 2019), adopted, Comm'n (July 31, 2019) (holding a corrections officer sleeping on duty at their post constitutes neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7)).

[3] "Airplane Mode" is a feature in the Apple Watch that allows the user to "turn off all the Bluetooth, Wi-Fi, cellular, and data connections" on the device. DigitalTrends.com, What is Airplane Mode? What it does and when to use it, available at https://www.digitaltrends.com/mobile/what-is-airplane-mode/.

PENALTY

In West New York v. Bock, 38 N.J. 500, 522 (1962), which was decided more than fifty years ago, the New Jersey Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Herrmann, 192 N.J. 19, 29 (2007) (citing Bock, 38 N.J. at 522). The Bock Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations, and the like on 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.

"Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, Bock, 38 N.J. at 523, that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990). Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 205 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994). The respondent has proven by a preponderance of the credible evidence the following charges against the appellant: Neglect of Duty in violation of N.J.A.C. 4A:2-2.3(a)(7) and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, for violating HRB § 84-17 (B-2), neglect of duty, and the appellant has stipulated that he has violated the remaining charges detailed in the January 26, 2021, FNDA: N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, HRB 84-17 §§ D-7, violation of administrative procedures and/or regulations involving safety and security, and E-1, violation of a rule, regulation, policy procedure, order, or administrative decision. The respondent seeks to remove the appellant from his job as discipline for these charges. The remaining question to be resolved, therefore, is whether the discipline sought to be imposed in this case is appropriate.

Although the Civil Service Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's disciplinary history may be outweighed if the infraction at issue is of a serious nature. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980); Bowden v. Bayside State Prison, 268 N.J. Super. 301, 306 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994). The concept of progressive discipline is recognized in this jurisdiction, but:

> That is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, 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 own position involves public safety and the misconduct causes risk of harm to persons or property.
>
> [In re Herman, 192 N.J. 19, 33-34 (2007), (citing Henry, 81 N.J. at 580).]

A singular incident of absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See Id. at 32.

The appellant's prior disciplinary history (R-17) shows that, in the approximately two years since the appellant graduated from the Academy, this is his first disciplinary action. While the penalty of termination for a first-time offense is certainly a serious disciplinary penalty, appropriate focus must be given to the nature and seriousness of the appellant's current actions. The appellant's conduct on February 10, 2020, was a serious offense committed by someone in a safety-sensitive position and the penalty should reflect the same. Given the serious nature of these actions—even without a prior disciplinary history—imposition of major discipline would be warranted. (See R-9 (DOC Policy PSM.001.017 prohibiting DOC staff from bringing electronic

communication devices inside secured perimeter of DOC facilities and noting "employees who violate the policy shall be subject to discipline, up to and including removal"); R-15 at DOC119 (HRB 84-17 § B-2 noting penalties for first offense range from five-day suspension to removal); Id. at DOC127 (HRB 84-17 § D-7 noting penalties for first offense range from official written reprimand to removal); Id. at DOC131 (HRB 84-17 § E-1 noting penalties for first offense range from official written reprimand to removal). See also Tr. at 169:9-14 (appellant's testimony acknowledging he deserves to receive major discipline for his conduct in this matter).) The appellant's status as a law enforcement officer places his conduct under heightened scrutiny. His primary duty is to enforce and uphold the law. "He carries a service [weapon] on his person and is constantly called upon to exercise tact, restraint and good judgment." In re Disciplinary Procedures of Phillips, 117 N.J. 567, 576-77 (1990) (quoting Moorestown, 89 Super. at 566). Being held to this heightened standard of conduct is one of the obligations the appellant undertook "upon voluntary entry into the public service." In re Emmons, 63 N.J.Super. at 142.

The appellant asserts that "removal is not warranted" in this case, and punishment should be mitigated by the fact that the appellant "could learn from his mistake, grow from his misjudgment, and still be an effective Senior Correctional Police Officer." (App. Br. at 23.) The respondent contends that the appellant's actions here "make[] him a clear safety threat and any penalty short of removal jeopardizes the safety and security of the prison." (Resp. Br. at 18.) In matters of inadvertent misjudgment, there is precedent for providing corrections officers without prior discipline a "second chance" where the offense is a singular momentary lapse of judgment. See, e.g., In the Matter of Alberto Aponte, Essex County, Department of Corrections, CSR 02049-19, Initial Decision, (September 24, 2019), adopted, Commission, (October 24, 2019) http://lawlibrary.rutgers.edu/oal/search.html (offering a "second chance" of six-month suspension in lieu of dismissal to corrections officer disciplined for ingesting a supplement which he did not know contained a controlled substance and failing a subsequent drug test). Tara Kelly, a Correctional Police Sergeant with DOC, who previously supervised the appellant on the job and assisted him in his training to become a Correctional Police Officer, testified that, despite the appellant's conduct on

February 10, 2020, she found him to be "competent and willing to learn" (Tr. at 194:18-19) and "very motivated" and needs "very little supervision" on the job. (Id. at 196:13-14.) Sergeant Kelly found the appellant willing to "take[ ] on any guidance that was ever offered to him" (id. at 196:4-5) and concluded that the petitioner could "absolutely" learn from this incident and improve on his future as a correctional police officer if he were allowed to return to work. (Id. at 195:21–196:1.) Sergeant Kelly determined that the appellant's actions on February 10, 2020:

> [W]as a naïve mistake. I think that he absolutely learned from it and if he's given a second shot like a lot of people are tending to do in this department he'll—he'll learn from it and he'll move forward.
>
> [Id. at 198:1-5.].

Sgt. Kelly concluded her testimony stating that "we give a lot of second opportunities for a lot of officers for things that can either be progressively worse or—or not as bad as this situation." (Id. at 199:19-22.) See, e.g., In the Matter of Michael Maiorino, CSV 5754-97, Final Decision, (May 4, 1999) http://lawlibrary.rutgers.edu/oal/search.html (imposing six-month suspension on corrections officer for sleeping on duty leaving a group of juvenile residents unattended on public property).

Although the focus is generally on the seriousness of the current charge as well as the prior disciplinary history of the appellant, consideration must also be given to the purpose of the civil service laws. Civil service laws "are designed to promote efficient public service, not to benefit errant employees. The welfare of the people, and not exclusively the welfare of the civil servant, is the basic policy underlining [the] statutory scheme." State-Operated School Dist. of City of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). "The overriding concern in assessing the propriety of the penalty is the public good. Of the various considerations which bear upon that issue, several factors may be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record." George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463, 465.

While the appellant, and all law enforcement officers, are held to a high standard, the appellant's conduct on February 10, 2020, failed to live up to that standard to exercise "tact, restraint, and good judgment." Prior to this incident, the appellant was only employed by the DOC for approximately two years, but during that time he has been discipline-free and obtained the rank of Senior Correctional Police Officer. The DOC has invested in the appellant's employment by way of his attendance at the academy and other trainings to qualify him for the position as a correctional police officer. The appellant has completed his training and accrued time on the job to obtain the rank of Senior Correctional Police Officer, thus evidencing prior good employment. Based on these factors, I **CONCLUDE** that the appellant should be given a second chance. In light of the seriousness of his misconduct on February 10, 2020, however, the appellant should be suspended for six months and thus forfeit his back pay and other emoluments for that period. This suspension reflects the poor judgment that the appellant displayed in violating the safety regulations at GSYCF by bringing his Apple Watch with him inside the secure perimeter and utilizing that watch during his shift when his full attention belonged on his assigned duties that day. Had the appellant quickly addressed his initial mistake of bringing the watch into the secured perimeter by notifying his superiors and removing the watch from the premises upon his realization that he had it with him when he reported to his post that morning, he would likely not be here facing possible removal from his employment. He did not address this initial mistake, but rather exacerbated his initial error, and the appellant clearly exercised poor judgment and ignored his training in doing so. As Sergeant Kelly noted in her testimony, however, the appellant is still at "just the beginning of his career" (Tr. at 195:19-20.) remains "very motivated" (id. at 196:13), willing to learn from his mistakes (id. at 195:23-196:1) and may still have the capability to have a long and otherwise successful career as a correctional police officer. (Id. at 196:21–25.)

While the length of the recommended suspension may be considered punitive, it balances the costs to the DOC that ensued from the appellant's actions against the loss of his career. Although the judgment he displayed on February 10, 2020, was certainly suspect, it does not appear that the appellant is beyond redemption. A suspension of six months will suffice to emphasize the seriousness of the conduct at issue while

affording the appellant a second chance to prove that he is worthy of the Department's largesse. Consequently, I **FIND** and **CONCLUDE** that the appellant's dismissal should be reversed.

CONCLUSION

After having considered all of the proofs offered in this matter, the impact upon the institution regarding the behavior by the appellant herein, and in light of the seriousness of the offense and in consideration of the appellant's prior disciplinary record, I **CONCLUDE** that the appellant should be **REINSTATED**, however, the appellant's conduct on February 10, 2020, was so egregious as to warrant a six-month suspension, which, in part, is meant to impress upon him, as well as others, the seriousness of his infractions.

ORDER

The respondent has proven by a preponderance of the credible evidence the following charges against the appellant: N.J.A.C. 4A:2-2.3(a)(7), neglect of duty, N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, for violating HRB § 84-17 (B-2), neglect of duty. The appellant has further admitted guilt to the other remaining charges of other sufficient cause, violation of HRB 84-17 §§ D-7, violation of administrative procedures and/or regulations involving safety and security, and E-1, violation of a rule, regulation, policy, procedure, order, or administrative decision. Accordingly, I **ORDER** that these charges be and are hereby **SUSTAINED**.

I **ORDER** that the penalty of removal from his position is hereby **REVERSED** and it is further **ORDERED** that the appellant be reinstated subject to a six-month suspension without pay and emoluments.

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.

September 1, 2020
DATE

DAVID M. FRITCH, ALJ

Date Received at Agency: September 1, 2021

Date Mailed to Parties: September 1, 2021

/dw

APPENDIX

LIST OF WITNESSES

For Appellant:

Timothy Firrman, appellant

Tara Kelly, Correctional Police Sergeant, New Jersey Department of Corrections

For Respondent:

Dominick Puzio, Senior Investigator, New Jersey Department of Corrections Special Investigations Division

Maria Jackson, SID Senior Investigator, Senior Investigator, New Jersey Department of Corrections Special Investigations Division

Ronald Paldino, Administrative Major, New Jersey Department of Corrections

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

None

For Respondent:

R-1 Final Notice of Disciplinary Action, January 26, 2021

R-2 NJ DOC SID Investigation Report, March 25, 2020

R-3 Emails from Maria Jackson, SID Sr. Investigator, February 11, 2020

R-4 Statement from appellant providing passcode to Apple Watch, February 10, 2020

R-5 Time and Leave Reporting System Inquiry, February 14, 2020

R-6 Photos of Apple Watch, February 10, 2020

R-7 Photos of entrance to GSYCF

R-8 GSYCF assignment schedule, February 10, 2020

R-9 NJ DOC Policy Statement, PSM.001.017, June 13, 2007

R-10 Garden State Correctional Facility, Internal Management Procedure, GS.101, August 1, 2017

R-11 Garden State Correctional Facility, Internal Management Procedure, GS.218, April 2009

R-12 Garden State Correctional Facility, Internal Management Procedure, GS.129, June 2007

R-13 Garden State Correctional Facility, Internal Management Procedure, GS.148, June 2007

R-14 New Jersey Department of Corrections, Law Enforcement Personnel Rules and Regulations

R-15 New Jersey Department of Corrections, Human Resources Bulletin 84-17

R-16 New Jersey Department of Corrections, New-Hire-Orientation Checklist, Timothy Firrman, March 17, 2018

R-17 New Jersey Department of Corrections, Work History, Timothy Firrman, March 22, 2021

R-18 New Jersey Civil Service Commission, Job Specification, Senior Correctional Police Officer

R-19 Interview of Timothy Firrman, March 20, 2020

R-20 Download of Apple Watch, February 10, 2020