



STATE OF NEW JERSEY

In the Matter of Sean Tonner
 East Jersey State Prison,
 Department of Corrections

DECISION OF THE
 CIVIL SERVICE COMMISSION

CSC DKT. NO. 2017-3792
 OAL DKT. NO. CSV 13420-17

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ISSUED: DECEMBER 1, 2021 BW

The appeal of Sean Tonner, Senior Investigator, Parole and Secured Facilities, East Jersey State Prison, Department of Corrections, 15 working day suspension and demotion to the position of Correctional Police Sergeant, effective May 17, 2017, on charges, was heard by Administrative Law Judge John P. Scollo, who rendered his initial decision on October 28, 2021 reversing the 15 working day suspension and demotion. Exceptions were filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on December 1, 2021, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

As the suspension and demotion have been reversed, pursuant to *N.J.A.C.* 4A:2-2.10, the appellant is entitled to 15 days of back pay and differential back pay from May 17, 2012, until his reinstatement as a Senior Investigator, Parole and Secured Facilities.¹ Additionally, as the charges have been reversed, he is also entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12. This decision resolves the merits of the dispute between the parties concerning the disciplinary

¹ It is noted that the back pay awarded for the reversal of the suspension and the differential pay awarded for the reversal of the demotion are not subject to mitigation under *N.J.A.C.* 4A:2-2.10(d)4. In this regard, the 15 days of back pay for the demotion are only subject to income earned during that period pursuant to *N.J.A.C.* 4A:2-2.10(d)3. Further, the mitigation provisions in *N.J.A.C.* 2-2.10(d) do not apply to demotions.

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 However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, unpublished, Docket No. A-5581-01T2F (App.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 counsel fees are finally resolved.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending and demoting the appellant was not justified. The Commission therefore reverses those actions and grants the appeal of Sean Tonner. The Commission further orders that appellant be granted 15 days of back pay, benefits, and seniority, as well as differential back pay from May 17, 2017, until his reinstatement as a Senior Investigator, Parole and Secured Facilities.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C. 4A:2-2.12*. An affidavit of services in support of reasonable counsel fees 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:2-2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount counsel fees.

The parties must inform the Commission, in writing, if there is any dispute as to counsel fees 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 1ST DAY OF DECEMBER, 2021

Deirdre L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Allison Chris Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 13420-17

CSC DKT. NO.: 2017-3792

**IN THE MATTER OF SEAN TONNER,
EAST JERSEY STATE PRISON,
DEPARTMENT OF CORRECTIONS.**

Brian M. Cige, Esq., for Appellant, Sean Tonner

**Karen Campbell, Esq. and Catherine Krieger, Esq. for Respondent, East
Jersey State Prison, Department of Corrections**

Record Closed: February 19, 2021

Decided: October 28, 2021

BEFORE: JOHN P. SCOLLO, ALJ:

STATEMENT OF THE CASE

After a Departmental hearing, the Hearing Officer sustained charges against Sean Tonner ("Tonner") for Conduct Unbecoming under N.J.A.C. 4A:2-2.3 and under Human Resources Bulletin (HRB) 84-17, as amended, that is, C-8 Falsification (of a work-related record) and C-11, Conduct Unbecoming. This is a *de novo* matter. The Respondent seeks affirmance of the decision reached at the departmental hearing and the affirmance of the fifteen-day suspension and demotion imposed. Tonner's position is that the DOC's written Policy did not require his transfer and that his letter to his

Superior was truthful. Tonner seeks to have all disciplinary measures rescinded and that he be restored to his rank of Senior Investigator with back pay and benefits.

PROCEDURAL HISTORY

The Respondent-D.O.C. brought charges against Tonner. The charges were for violations of N.J.A.C. 4A:2-2.3 (a) (6) (Conduct Unbecoming a Public Employee); N.J.A.C. 4A:2-2.3 (a) (12) (Other Sufficient Causes); Human Resources Bulletin, as amended, Section (c) (8) (Falsification, Intentional Misstatement of a Material Fact in connection with work, etc.); and Human resources Bulletin, as amended, Section (c) (11) (Conduct Unbecoming an Employee). A Departmental Hearing was held before Hearing Officer Michael Rutherford ("Rutherford") on April 20 and May 8, 2017. In its May 25, 2017 Final Notice of Disciplinary Action (FNDA) the Department of Corrections / East Jersey State Prison (hereinafter, "Respondent", "the D.O.C." or "EJSP"), notified Tonner that Rutherford determined that the charges against Tonner were sustained. The Respondent-D.O.C. thereupon imposed discipline upon Tonner. Tonner filed a timely appeal and the matter was referred to the OAL and filed on September 11, 2017 under Docket Number CSV 13420-17 as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52: 14F-1 to -13.

Respondent filed a Motion *in Limine* dated May 23, 2018 seeking to bar the discovery or use at trial of a "data sheet" containing the names of D.O.C. employees who were involved in romantic relationships with other D.O.C. employees. Respondent also sought to prevent the Appellant from calling Principal Investigator, Terence Smith to testify about said relationships and the D.O.C.'s handling of same. Shortly thereafter, the Appellant filed a discovery Motion seeking more specific answers to his discovery requests. I granted the Respondent's Motion *in Limine* to bar the discovery of information about the personal relationships of non-party D.O.C. employees contained in their personnel files, and I ruled that the testimony of Principal Investigator Terence Smith about such personal relationships was irrelevant to the question of whether Tonner's memo to his superior did or did not contain false information. I granted the

Appellant's Motion for more specific answers to several of the Appellant's Interrogatory questions, inasmuch as they did not ask for personal information from personnel files.

By a previous Order of Extension, Governor Murphy's Executive Order Number 127, the due date for issuing an Initial Decision was extended until September 4, 2021. An additional extension was granted on September 28, 2021, extending the deadline to October 19, 2021. With the submissions of summations, the record closed on February 19, 2021.

BACKGROUND INFORMATION

From listening to both sides, I **FIND** that the following facts are not in dispute. According to Chief Manuel Alfonso, the Special Investigations Division (SID) is tasked with conducting all the administrative and criminal investigations within the New Jersey Department of Corrections. For twenty-one years, Sean Tonner (hereinafter "Tonner") worked for the Department of Corrections (D.O.C.), more recently in the Special Investigations Division (SID) at the Edna Mahan Correctional Facility (EMCF) in Clinton (Union Township), Hunterdon County, New Jersey. On July 2, 2016, Senior Investigator Tonner and his then-girlfriend, Melinda Minorics, who was a civilian employee at EMCF, but not within Tonner's chain-of-command, were involved in a domestic violence incident which resulted in Minorics's arrest and the imposition of a Pennsylvania Probation Department's restriction preventing her from entering the home and having contact with Tonner. After the domestic violence incident, Assistant Chief Manuel Alonso (hereinafter "Alonso"), following what he believed to be D.O.C. policy protocols, determined that Tonner and Minorics could not work in the same facility (EMCF) and arranged for Tonner's transfer to New Jersey State Prison in Trenton, New Jersey. After another Senior Investigator named Michael Cubic, who worked at the nearby Mountain View Youth Correctional Facility, volunteered to be transferred to Trenton in Tonner's place, Chief Alfonso transferred Tonner to the Mountain View facility.

On July 12, 2016, Tonner sent a letter (hereinafter, the "7/12/16 letter", marked as Exhibit R-6) to Alonso, in which he stated that the commute to Trenton would result in a financial hardship and he requested that he not be transferred from the Edna Mahan Correctional Facility to Trenton, New Jersey. In The subject letter, Tonner stated that he was no longer in a relationship (meaning a romantic relationship) with Melinda Minorics. Sometime in January, 2017, which was after the date when Tonner was transferred back to the Edna Mahon Correctional facility, the D.O.C. received an anonymous phone call in which a female caller informed D.O.C. that Tonner and Minorics were involved in a romantic relationship, were working in the same facility and that the relationship was not going well. As a result of the anonymous phone call, the D.O.C. launched an investigation and concluded that Tonner never ended his romantic relationship with Minorics, that he misrepresented this to Alonso in the 7/12/2016 letter, and that he wrote the letter in order to procure a personal and / or financial benefit for himself.

The D.O.C. decided that there was sufficient evidence against Tonner to bring charges against him. Charges of violating two sections of HRB 84-17, as amended, were brought against Tonner. They are:

C.8, Falsification prohibits the making of an intentional misstatement of a material fact in connection with work, employment application, attendance, or in any record, report, investigation or other proceeding; and

C.11, Conduct unbecoming an employee; E.1, Violation of a rule, regulation, policy, procedure, order or administrative decision; and E.2, Intentional abuse of misuse of authority or position.

Both the Falsification charge and the Unbecoming Conduct charged under HRB 84-17, as amended, are in the nature of "Unbecoming Conduct" and so, he was charged with engaging in unbecoming conduct.

At a Departmental hearing held on April 20 and May 8, 2017, the charges were sustained. Tonner was demoted to Corrections Sergeant and suspended for fifteen days.

APPLICABLE LAW

Before reviewing Duane Grade's or anyone else's testimony, it is necessary to analyze and understand several documents which contain the policies and procedures which Tonner is alleged to have violated. These documents constitute the applicable governing legal principles in this matter. They are entitled / designated below by bracketed Roman Numerals [I], [II] and [III]

[I] The first document to be examined is the “**Policy Prohibiting Familial and Consensual Personal relationships Between Supervisor and Subordinate**”, dated December 30, 2002, effective date January 22, 2003, found in R-7. The policy in R-7 will be referred to herein as “the Policy”, the policy in R-7, or the “R-7 Policy”.

Respondent's Exhibit R-7 contains a two-page 12/30/2002 Memorandum from D.O.C. Commissioner Devon Brown announcing the policy to all Assistant Commissioners, Directors and Administrators. The next four pages (ps. 3-6) contains the actual provisions of the Policy. The essence of the Policy (i.e., the mandate to report any familial relationship or consensual personal relationship) is contained in the paragraph labelled “Reporting Responsibility of a Supervisor”. There, it says that a *supervisor* who has either a *familial relationship* or a *consensual personal relationship* with a *subordinate* must report the relationship to his / her superior. (Emphasis supplied.) The seventh (last) page is the Receipt, which all recipients of the policy were required to sign. The method of analyzing the R-7 Policy will focus on the wording of the Policy itself. The same method will apply to the analysis of the other documents.

The “Policy Regarding Familial and Consensual Personal Relationships” is not herein set forth verbatim. Rather, I have summarized and analyzed it as follows.

Authority. The Policy cites the statutory authority of the Commissioner of the D.O.C. emphasizing the need for organization and efficient operation of the D.O.C. It also ties-in with the requirements of the New Jersey Conflicts of Interest Law.

Purpose. The reason for the Policy is to eliminate favoritism and to eliminate the perception of favoritism from the D.O.C. as a workplace. Therefore, a supervisor who shares a familial relationship or a consensual personal relationship with a subordinate will not, under the Policy, be assigned as a supervisor and may not serve as a supervisor *within the chain of command* of that subordinate employee. (Emphasis supplied.)

Definitions. The Policy defines the terms (1) "Familial Relationship", (2) "Consensual Personal Relationship", (3) "Supervisor", and (4) "Subordinate".

The term "familial relationship" refers to people who are related by blood, by marriage, and those (a supervisor and a subordinate) who live in the same household.

The applicable categories are set forth as follows:

- A. Grandparent – Grandchild;
- B. Husband – Wife;
- C. Parent – Child, including a relationship through marriage;
- D. Brother-Sister, including a relationship through marriage;
- E. Aunt/Uncle – Niece/Nephew, including a relationship through marriage;
- F. A supervisor and subordinate who live in the same household.

The term "consensual personal relationship" refers to people involved in any one of the following types of relationships, but does not apply to purely social relationships:

- A. Marriage;
- B. Cohabitation;
- C. Engagement; or

D. Dating or other *ongoing* relationship of an intimate or close personal nature.
(Emphasis supplied.)

The term "Supervisor" is defined as:

"one who *regularly* exercises supervisory authority over a subordinate in any one or more of the following ways:

- A. Assigns duties to a subordinate;
 - B. Established a work schedule for a subordinate;
 - C. Evaluates the work performance of a subordinate;
 - D. Recommends or takes any action to initiate discipline against a subordinate;
 - E. Orders written reports or reviews reports made by a subordinate;
 - F. Reviews written or oral complaints or responds to such complaints made against a subordinate;
 - G. Responds to a grievance filed by a subordinate."
- (Emphasis supplied.)

The term "Subordinate" is defined as:

"an employee who falls within the *chain-of-command* of a supervisor in a work unit, correctional facility, district or regional office." (Emphasis supplied.)

Reporting Responsibility of a Supervisor.

This section of the Policy requires that any civilian or law enforcement *supervisor*, who has a familial or consensual personal relationship with a *subordinate*, must report the relationship in writing to his / her superior. Supervisors assigned to correctional facilities are required to report it to the Administrator. However, SID personnel assigned to a correctional facility are to report the relationship to their Chief Investigator. In the case of supervisors assigned to the Division of Programs and

Community Services, they are required to report the relationship to his / her Assistant Commissioner. In the case of supervisors assigned to the Central Office, they are required to report the relationship to the Assistant Commissioner of the Division of Administration. Finally, all supervisors are required to report any after-acquired familial or consensual personal relationships to his / her designated superior within seven calendar days. (Emphasis supplied.)

Effective Date of the Familial and Consensual Personal Relationship Policy.

This section stated that the effective date of the Policy was January 22, 2003 and it sets forth the dates by which various filings were due.

Maintenance of Supervisory Authority.

This section states that a subordinate may not refuse a lawful order issued by a supervisor, regardless of any existing familial or consensual personal relationship. It also states that nothing in the Policy prohibits a supervisor from issuing a lawful order to a subordinate, even one with whom he /she has a familial or consensual personal relationship, in emergency circumstances.

Violations of the Familial and Consensual Personal Relationship Policy.

This section provides that a supervisor's failure to timely comply with the reporting requirements of the Policy can result in the imposition of discipline and can result in a denial of legal representation and indemnification under the New Jersey Tort Claims Act.

[II] The November 21, 2013 "Memorandum" from Ethics Officer Leila Lawrence, Esq. was sent to all D.O.C. Supervisors. This memorandum refers to N.J.S.A. 52:13D-23, New Jersey's Uniform Ethics Code. It states that NJDOC *supervisors are prohibited from supervising or participating in any employment actions*

involving *their family members, business partners, roommates or cohabitants, and also includes someone whom the supervisor is dating* (Emphasis supplied); and

[III] The “Law Enforcement Personnel Rules and Regulations”, Article II, Sections 7 and 8 and Article III, Section 3, which are set forth below and are self-explanatory.

Article II, Section 7 reads as follows:

“No officer shall make, or cause to be made, any *false or misleading* statements. “

“No officer shall intentionally omit or *misrepresent* facts or information known to the officer.” (Emphasis supplied.)

Article II, Section 8 reads as follows:

“No officer shall make false or misleading reports.”

“No officer shall alter or tamper with official reports.”

“No officer shall enter, in any official book or record, any false or misleading statements.”

“An officer shall fully and completely perform reporting duties and failing to exercise due diligence in any report writing shall constitute neglect of duty.”

Article III, Section 3 reads as follows:

“No officer shall act or behave, either in an official or private capacity, to the officer’s discredit, or to the discredit of the department.”

“Officers are public servants twenty-four hours a day and will be held to the law enforcement higher standard both on and off-duty.”

The Law of Conduct Unbecoming a Public Employee is found at N.J.A.C. 4A:2-2.3 (a)(6).

Under N.J.A.C. 4A:2-2.3(a)(6), an employee may be subject to major discipline for conduct unbecoming a public employee. Although not strictly defined by the Administrative Code, "conduct unbecoming" has been described as that conduct "which affects the morale or efficiency of the [governmental unit] [or] which adversely affects the morale or efficiency" of the public entity or tends "to destroy public respect for . . . [public] employees and confidence in the operation of . . . [public] services." In re Emmons , 63 N.J. Super. 136, 140 (App. Div. 1960); see Karins v. City of Atl. City , 152 N.J. 532, 554 (1998) (citation omitted). The conduct need not be "predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't. of Ridgewood, 258 N.J. Super 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Unbecoming conduct may include behavior that is not in accord with propriety, modesty, good taste or good manners, or behavior that is otherwise unsuitable, indecorous or improper under the circumstances. Conduct unbecoming a public employee may be less serious than a violation of the law, but it is inappropriate to on the part of the public employee. Ferrogine v. State Dep't. of Human Servs., Trenton Psychiatric Hosp., CSV 2441-98, Initial Decision (April 17, 1998), modified MSB (July 6, 1998), <http://njlaw.rutgers.edu/collections/oal/>. It is a fact-sensitive determination rather than one based on a legal formula.

Employee Discipline

The Civil Service Act and the implementing regulations govern the rights and duties of public employees. N.J.S.A. 11A:1-1 to 12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. The Act is an important inducement to attract qualified personnel to public service. It is to be liberally constructed toward attainment of merit appointments and broad tenure protection. See Essex Council No.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 County Park Comm'n , 46 N.J. 138, 147 (1965). The Act also recognizes that that the public policy of New Jersey is to provide appropriate

appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2 (b). To carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

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; and N.J.A.C. 4A:2-2.3. Major discipline involves removal, suspension, or fine for more than five working days.

An appointing authority may discipline an employee on various grounds, including inability to perform duties, conduct unbecoming a public employee, insubordination, and other sufficient cause. N.J.A.C. 4A:2-2.3(a). Such action is subject to review by the Civil Service Commission, which after a de novo hearing makes an independent determination as to both guilt and the "propriety of the penalty imposed below." W. New York v. Bock, 38 N.J. 500, 519 (1962); In the Matter of Morrison, 216 N.J. Super. 143 (App. Div. 1987); Ennslyn v. Twsp. of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994) cert. den., 142 N.J. 446 (1995).

The Necessity for Maintaining Discipline

Maintenance of strict discipline is important in quasi-military settings such as police departments and correctional facilities. Rivell v. Civil Serv. Comm'n., 115 N.J. Super. 64, 72 (App. Div. 1995), cert. den. 142 N.J. 446 (1995). City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). In such settings, the primary duty of the officers and supervisors is the safety and security of the facility. Police (and correction) officers are held to a higher standard of conduct than ordinary public employees. In Re Phillips, 117 N.J. 567, 576-577 (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." Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), cert. denied, 47 N.J. 80 (1966).

Burden of Proof in Disciplinary Matters

In a civil-service disciplinary case, the employer bears the burden of providing sufficient, competent and credible evidence of facts essential to the charge. N.J.S.A. 4A:2-1.4. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). Put another way, in an administrative proceeding concerning a major disciplinary action, the appointing authority must prove its case by a "fair preponderance of the believable evidence." N.J.A.C. 4A:2-1.4(a); Polk, supra, 90 N.J. at 560; Atkinson, supra, 37 N.J. at 149. 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 (1958). Greater weight of credible evidence in the case - a preponderance - depends not only on the number of witnesses, but "greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975) (citation omitted). Similarly, credible testimony "must not only proceed from the mouth of a credible witness, but it must be credible in itself." In re Estate of Perrone, 5 N.J. 514, 522 (1950). The judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Delaware, Lackawanna and Western Railroad, 111 N.J.L. 487, 490 (E.&A. 1933).

SUMMARY OF TESTIMONY

The following is not a verbatim summary of the testimony of various witnesses. Rather, it is a summary of testimony that I found relevant and important to the resolution of this matter.

Review and Analysis of the Testimony of Assistant Chief (later Deputy Chief) Duane Grade

Duane Grade began his career with the New Jersey Department of Corrections in 1994, as a correction officer. In 1996 he entered the Special Investigative Division

(SID) and in 2005, he was promoted to the rank of Principal Investigator. From 2008 to 2010 he was in private industry, but he returned to the D.O.C. in 2010 as a correction officer, re-entered the Investigative Division in 2012, was promoted to Assistant Chief (now called Deputy Chief) in 2013 and was promoted to Chief Investigator in 2017. As Chief Investigator, he would supervise everyone in his chain-of-command. The chain went as follows: Chief Investigator over the Deputy Chief Investigator, over the Principal Investigators, over the Senior Investigators, over the Investigators, totaling approximately 111 people, including 82 sworn officers. To give the reader a better idea of the function of the SID, I will insert at this point in time the following from the testimony of Chief Manuel Alfonso. Chief Alfonso testified about the functions of the SID at p.52. He said, "The Special Investigations Division is tasked with conducting all the administrative and criminal investigations within the New Jersey Department of Corrections."

Grade's substantive testimony started with the question, "What did you learn about this case?" He responded by saying that Tonner and Minorics had a relationship; that they worked in the same facility; and that Tonner authored a letter dated July 12, 2016 to Chief Alfonso informing the Chief that the relationship had ended. When asked how the letter came to be, Grade responded that he did not know how it was written, but that Tonner sent it to Alfonso. He added that he did not know if Alfonso told him (Grade) to tell Tonner to write it, or whether Tonner's Principal Investigator told him to write it. Grade added that he did not know if anyone told Tonner what to write in the letter. When Grade was asked if he knew why Tonner wrote the letter, he responded that Tonner did so to inform Alfonso that the relationship had ended. When asked to amplify his answer, Grade testified that he discussed with Chief Alfonso that because Tonner had a consensual personal relationship with Minorics, Chief Alfonso decided that Tonner must be transferred from EMCF to New Jersey State Prison in Trenton. Grade added that Alfonso told him to inform Tonner of the transfer. Grade testified that he telephoned Tonner to tell him about Alfonso's decision to transfer him to Trenton. [NOTE: During both his initial OAL testimony and his rebuttal OAL testimony, Grade did not state the date of that phone call. However, Tonner-1, which was not marked into evidence, but which I am allowed to refer to as a matter of judicial notice pursuant to

N.J. Rules of Evidence 201 (f), contains a copy of the transcript of the April 20, 2017 of the Departmental Hearing. On page 42 of that transcript, Grade, who was then prosecuting the Department's case against Tonner and who is now a fact witness, stated that Tonner was advised on July 6, 2016 of Alfonso's directive that he be transferred to the prison in Trenton. So apparently, Grade placed the telephone call to Tonner on July 6, 2016.] Grade's testimony was that upon hearing the news of the impending transfer, Tonner told him that the transfer to Trenton would create a financial hardship for him and he asked Grade to speak with Alfonso about the hardship. Grade agreed to do so and spoke with Alfonso, but in his testimony, Grade did not specify the date of that conversation. Grade testified that Alfonso directed him to contact Tonner to inform him that the transfer would be delayed. Grade did not specify whether the letter from Tonner to Alfonso was written before or after the Grade-Tonner phone call, but from Grade's statement on page 42 of the Departmental Hearing transcript of April 20, 2017, it is clear that the phone call took place on July 6, 2016 and everyone agrees that the letter was written on July 12, 2016. Grade was not asked about whether he ever saw Tonner's letter to Alfonso or whether he had any specific knowledge of its contents beyond Tonner saying that the Tonner-Minorics relationship had ended.

The questioning of Grade then shifted to various documents. The content of each document will be set forth below. Grade's testimony regarding each document will also be set forth below.

Grade was asked about the Policy in R-7. He stated that the documents in R-7 were sent by Commissioner Brown to all Assistant Commissioners, Directors and Administrators informing them that the D.O.C. had formalized a policy requiring all supervisors to report any familial or consensual personal relationships that the supervisor might have with a subordinate. Grade explained that the D.O.C. wanted to eliminate favoritism, real or perceived. When asked about what the Policy allowed or prohibited regarding familial or consensual personal relationships, he explained that under the Policy *any D.O.C. employee* could have a relationship with whomever he wanted, but if that relationship was with someone "*who works in the same workplace as you*", it had to be reported and "*one or the other has to be relocated, assigned to*

another facility.” Grade went on to testify that if a supervisor had a familial or consensual personal relationship with a subordinate, then the supervisor would have to be the one who was transferred to another location.

Grade was questioned about how the Policy applied to SID (Special Investigations Division). Grade testified that because investigators in SID had the power to question and investigate people in the same facility, this would necessarily invest the investigator with “power” or “control” over said people. Grade stated that if an investigator were to investigate or question someone who was related to him (i.e., in a familial or consensual personal relationship), it could create problems with the gathering of information and with maintaining the integrity of the investigative process. His point was that the Policy was very pertinent to SID personnel, where it was important that SID investigators not accidentally or otherwise leak intelligence information to anyone, even those close to them such as people with whom they had a familial or a consensual personal relationship.

Toward the end of his testimony, Attorney Krieger asked Grade how a member of SID could be considered a “supervisor” in a correctional facility. Grade’s response was ungrammatical and did not constitute a coherent answer to the question. Attorney Krieger then re-asked the question by leading Grade to reiterate his previous point. So, Grade responded by reiterating his testimony about members of SID having the duty to conduct investigations, which gave them “authority” or “control” over people in their workplace whom they might need to investigate or question. Grade seemed to equate this “power” or “control” which an investigator might wield while conducting an investigation with the concept of supervising people who heretofore had not been under his supervision. Grade did not explain how an investigator’s supposed “authority” or “control” over co-workers transformed an investigator into a “supervisor” as that term is defined in the Policy or how such supposed “authority” or “control” transformed every co-worker into a “subordinate” as that term was defined in the Policy.

The next document Grade testified about was R-9, a November 21, 2013 “Memorandum” from Ethics Officer Leila Lawrence, Esq. to all D.O.C. Supervisors. This

memorandum refers to N.J.S.A. 52:13D-23, New Jersey's Uniform Ethics Code. It states that NJDOC supervisors are prohibited from *supervising* or participating in any employment actions involving their family members, business partners, roommates or cohabitants, and also includes someone whom the supervisor is dating. When Grade was asked if the Ethics Code was applicable to Tonner's situation, he responded that Tonner violated the Ethics Code when he wrote to Alfonso stating that he had ended his relationship with Minorics. (Emphasis supplied.)

The next document Grade testified about was in R-11 and was entitled "Law Enforcement Personnel Rules and Regulations", which he said governed all D.O.C. officers, including those in SID. He read the provisions of Article II, Sections 7 and 8 and Article III, Section 3 aloud. [See the APPLICABLE LAW Section of this Initial Decision for the full text of these Articles and Sections.] When Grade was asked if the set of Rules & Regulations was applicable to Tonner's situation, he responded with the same answer that he gave in response to the question about the Ethics Code.

During cross-examination of his initial testimony, Grade testified that when the anonymous telephone call about Tonner was received in SID in January, 2017, he did not inquire into who made the call.

Grade was called back as a rebuttal witness, in part, to testify in response to Tonner's assertion that Grade told him to write the letter to Chief Alfonso and that Grade suggested points he should make in the letter. During his rebuttal testimony, Grade repeated his prior testimony: that Chief Alfonso told him to call Tonner to inform him that he was going to be transferred to Trenton; that when he spoke with Tonner, Tonner stated that he had financial concerns and he asked Grade to speak with Alfonso; that when he spoke Alfonso, Alfonso told him to tell Tonner that the transfer to Trenton would be delayed; and that Mr. Cubic volunteered to be transferred to Trenton in Tonner's stead. Upon additional questioning during his rebuttal testimony, Grade denied ever telling Tonner that it was unfair that Tonner was being transferred and he also testified that Senior Investigators could be re-assigned to different facilities based on the Department's needs.

During cross-examination of his rebuttal testimony, Grade testified that there was a practice in place that in cases of domestic violence related people who worked in the same facility would be separated (i.e., one would be transferred) for the sake of safety and for security reasons. In answer to a broader question regarding whether he knew of a written policy that required the transfer of a person who was related to a person in the same facility, Grade recalled testifying earlier that there was a written policy against people working in the same facility with people to whom they had a familial or consensual personal relationship. However, he seemed to say (His testimony was not strictly grammatical) that there was also an additional policy or practice in place for SID that required their separation. Although Grade admitted that Tonner and Minorics were not in the same chain-of-command (which is a requisite of the R-7 Policy), he emphasized that the D.O.C.'s policy addressed the problem of two related people being in the same facility because of the possibility of that an investigator might have to exercise power over the person to whom he was related during an investigation. He also re-iterated that due to the nature of SID's work, the supervisor would be the person transferred rather than the subordinate.

Analysis and Comments on Grade's Testimony

The following are my comments about Duane Grade's testimony. During his initial direct testimony, he comprehended the questions put to him, but his memory was only fair. For instance, at the very start of his testimony he could not remember when he became aware of the Tonner-Minorics relationship, saying that "maybe" it was in July, 2016. Also, during his initial testimony, Grade could not recall how the 7/12/2016 letter came into being. That is, he could not recall who told Tonner to write it. Grade was re-called to the stand, among other reasons, to rebut Tonner's assertions that it was Grade himself who told Tonner to write the letter (Tonner's testimony, p.29); that Grade suggested what to express in the letter (Tonner, p. 90); and that Tonner's supervisor, Jerome Scott, delivered the letter to Grade (Tonner. P. 30). Interestingly, Grade did not attempt to rebut Tonner's assertions that Grade told him to write the letter, what to say in the letter, or that the letter was delivered to him.

There is one special difference between the testimony of Duane Grade and the testimony of Sean Tonner. Grade testified that he did not know who, if anyone, encouraged Tonner to write the 7/12/16 letter to Alfonso. Tonner testified that Grade suggested to him that he should write a letter to Alfonso explaining how a transfer to Trenton would add sixty miles to his daily commuting and thus cause a hardship; and that Grade would speak with Alfonso to suggest a transfer to Mountainview, which would only add three miles to his daily commuting. Tonner added that his supervisor, Jerome Scott, told him that Grade was waiting for the letter.

Much of Grade's testimony was in the form of sentence fragments instead of complete sentences. Throughout much of Grade's testimony he was relying upon hearsay rather than his own perceptions and recollection as indicated by his frequent use of the phrases, "I'm not sure" and "I believe" when testifying about factual matters. Also, at times, Grade's responses to certain questions sounded rehearsed. Tonner's recollection of the facts was clearer than Grade's recollection. Both Grade and Tonner stated that they were on friendly terms at all times. Tonner testified that he thanked Grade for his help. My findings regarding the comparison of Grade's credibility versus Tonner's credibility are set forth in the FINDINGS OF FACT section of this Initial Decision.

When questioned about D.O.C. policies that called for the separation of related people who were in the same workplace, Grade re-iterated his prior testimony. He stated that the concern was for security (preventing the divulgence of intelligence, i.e., sensitive information) and for preventing undue influence due to a familial or consensual personal relationship, but he did not explain how, when in the course of an investigation, an investigator became a "supervisor", as that term is defined in the Policy (R-7) or how he acquired "authority" or "control" over someone, including a co-worker, whom he might need to question or investigate.

In both his initial testimony and in his rebuttal testimony, Grade testified that D.O.C. personnel were free to date or have romantic relationships with whomever they

wanted. However, he said there were circumstances where they were required to report to the D.O.C. that they were in a relationship with another D.O.C. employee. Counsel showed several documents to Grade regarding the duty to report such relationships. However, all these policies referred to situations where the one employee was supervising a subordinate employee with whom he has a familial or personal relationship. All parties to the case agree that Tonner and Minorics were not in the same chain-of-command and that they did not supervise one another at any time. However, the answers to the direct questions put to Grade assumed that Tonner, when carrying out his investigative duties was acting as one who "exercised authority" and that the presence of Minorics in the same facility (with whom Tonner was involved in a personal relationship but who was not in his chain-of-command) somehow created a potential for a security risk, e.g., for her to unduly influence Tonner's investigative objectivity. I found that Grade's conclusion was mere supposition. It was neither justified by the factual evidence nor by any inherent logical support. In other words, Grade's conclusion was a *non sequitur*.

As a matter of additional analysis and comment, I found Grade's explanation of the R-7 Policy to be a significant factor in this matter. This is because, as will be seen below, his interpretation of the R-7 Policy actually expands the scope of the R-7 Policy beyond its literal text.

Grade answered Attorney Krieger's questions about how the R-7 Policy applied to the SID (p.64, Ln10 – p.65, Ln.12). Grade's testimony demonstrates that he interpreted the R-7 Policy, where SID was concerned, as expanding the reporting requirement. His expansion of the R-7 Policy grows from covering only those involved in a supervisor-subordinate relationship to one where the reporting requirement was mandated whenever an SID investigator has a relationship with "someone" (meaning *anybody*) in the facility. Grade's choice of words is significant. Thus, it became clear to me that Grade's understanding of the "Policy" was well beyond what was contained in the text of the Policy set forth in R-7. Inherent in his testimony is his assumption that the term "investigator" somehow merged with the term "supervisor". However, there is no justification for merging these two separate and very different terms.

As Grade (and others from the D.O.C.) interpreted the R-7 Policy, its scope expanded from requiring only those in a "Supervisor-Subordinate relationship" (a limited set of people) to report the familial or consensual personal relationship to one where an investigator who has a relationship with any employee (a larger set of people) would be required to report the familial or consensual personal relationship.

It is important to appreciate this expansion because the case will be determined by the breath of the actual text of the R-7 Policy versus Grade's and the other D.O.C. officials' unjustified expansion of the text of the R-7 Policy. That is to say, the D.O.C. officials misinterpreted the actual wording of the R-7 Policy and relied on an alleged (but unwritten) policy that Alfonso only vaguely remembered and which Calderon admitted he never even saw. The D.O.C.'s confusion and misunderstanding of the R-7 Policy is at the very core of this matter.

Review and Analysis of the Testimony of Senior (later Principal) Investigator, David Calderon

David Calderon began his career with the NJDOC, graduating from the Correction Officer Training Academy in 1994 and working at both Edna Mahan Correctional Facility and at East Jersey State Prison, where he was promoted to Senior Correction Officer. He was assigned to SID in 2007 as an Investigator, where he conducted administrative and criminal investigations. In 2013 he was promoted to Senior Investigator, became acting Principal Investigator and since 2017 holds the position of Principal Investigator in the DOC's Internal Affairs Unit, which is now called the Professional Standards Unit.

The first question posed to Calderon asked about how the case arising out of an anonymous telephone tip to SID's Internal Affairs Unit was assigned to him. Calderon's response was that Principal Investigator (now Deputy Chief) Edward Soltys made him aware of the details of the anonymous telephone call regarding Tonner and Minorics and gave him a copy of Tonner's July 12, 2016 letter to Chief Alfonso. Soltys assigned

him to start an investigation of the facts of the Tonner-Minorics relationship and the veracity of Tonner's statement in the letter to Alfonso. He testified that his investigation of Tonner and Minorics included obtaining verification of their address and surveillance of their dwelling, obtaining their D.O.C. phone records and D.O.C. email records, and conducting video interviews with each of them.

Calderon made a video of his interview of Tonner (R-16) on February 10, 2017 (with Deputy Chief Soltys and Union Representative Greg Cirillo also in attendance). [By way of context, it must be noted that Tonner had been transferred from EMCF to Mountain View in July, 2016 and had returned to EMCF in December, 2016 at the direction of Chief Alfonso. Also, by this time Tonner was aware that he was under investigation for writing the 7/12/2016 memo to Alfonso.]

Calderon played the video for the Tribunal. On the video, Calderon told Tonner that SID received an anonymous phone call in which the female caller reported that Tonner were living together but that the relationship was not a good one, and that they were working in the same facility (EMCF). Calderon asked Tonner if he and Minorics were presently in a (romantic) relationship and Tonner responded that Minorics was his ex-girlfriend and that they were not in a relationship; however, later in the interview, Tonner stated that the relationship could be re-kindled at any time.

Early on (p.108) in the interview and later on (p.117), Calderone mentioned a prohibition against SID personnel working in a D.O.C. facility where a related person (referred to as a "significant other") also worked. Calderon presumed that Tonner was aware of the prohibition or policy. Calderon's questions were premised on there actually being such a policy in place and upon Tonner being aware of this prohibition. However, Tonner stated that he did not know of this prohibition until Chief Alfonso took action to transfer him in July, 2016 because of the domestic violence incident of July 2, 2016 and because of the fact that Tonner and Minorics had a personal relationship and worked in the same facility. Tonner stated that he had never seen a written document containing this prohibition. Tonner said he became aware of the prohibition or policy only when he learned that he was going to be transferred. Calderon referred to the

receipt that Tonner signed for the December 30, 2002 (R-7) Policy. Tonner started to say (on p.118) that the December 30, 2002 Policy was unrelated to his circumstances, but Calderon cut off Tonner's response to the question, said he was not going to debate the reasons for the policy, and moved on to questioning Tonner about whether he presently had any type of relationship with Minorics.

Calderon asked Tonner, "Do you have any kind of relationship with Ms. Minorics now?" Tonner responded that he rented a room from Minorics. This prompted Calderone to ask the question: "You live together, but you're no longer involved with each other?" Tonner responded, "No. I typically don't stay with people that beat the shit out of me." This prompted Calderon's next question: "But you'll rent a room from them?". Tonner responded, "I have no choice."

Calderon moved on to questions about what, if any, interactions Tonner and Minorics had with each other after the domestic violence incident, such as talking with each other during the day or having lunch together. Tonner acknowledged that he and Minorics have been making phone calls and exchanging texts and stated that they had lunch together on the (December) day that Chief Alfonso called Tonner to tell him that he was going to be transferred back to EMCF. Calderon asked if Tonner was aware that State emails are archived. Tonner responded that he was aware of this. Calderon pointed out that there were quite a few emails showing that Tonner and Minorics regularly went out to lunch together, that there was an email indicating that Minorics was going to pick-up Tonner's shirts at the cleaners, that they were going to celebrate a 20-year anniversary and other types of matters which seemed to indicate that the Tonner-Minorics relationship was more than a landlord-tenant relationship and that it was actually an ongoing personal relationship. Tonner explained that the 20-year anniversary had to do with Minorics' job longevity anniversary, not an anniversary pertaining to a personal relationship. Tonner also responded that the personal relationship ended after the July 2, 2016 domestic violence incident; that at the time he wrote the July 12, 2016 letter the relationship was already terminated; that he continued to reside at Minorics' dwelling because he could not afford to move elsewhere; and that as time went on, he and Minorics talked more. In answer to Calderon's question about

Tonner and Minorics having been in a "paramour boyfriend/girlfriend relationship" at the time of the July 12, 2016 letter to Alfonso, Tonner reiterated that he and Minorics had been in a relationship, but were not now in a relationship, but he left open the possibility that it could be "re-kindled again" in the future.

Calderon asked if Tonner and Minorics had taken any trips together (knowing that they went on a cruise in December, 2016). Tonner acknowledged that they went on the cruise because it had been pre-paid.

The rest of the interview discussed Driver's License issues, Human Resources issues having to do with domicile, and Tonner's assertion that there was an individual in D.O.C. named Jerome who was trying to get Tonner removed from his job due to job-related disagreements.

After the playing of the February 10, 2017 Interview, Attorney Campbell asked Calderon to identify and read from various emails (R-4). He also noted that State phone records (R-3) showed that Tonner and Minorics had 21 telephone conversations between July, 2016 and December, 2016. Calderone also identified his February 14, 2017 Report (R-2). The emails indicated that within a few days of the domestic violence incident, Tonner and Minorics were trying to work together to lift the Probation agency's instructions which prohibited Minorics from visiting Tonner and that they wanted to see each other and participate in mutual activities, including a trip to the beach. Other emails indicated that over the ensuing weeks and months Tonner and Minorics were conversing pleasantly (mostly about eating lunch). They even joked about a note left by a female employee on Tonner's lunchbox. They also conversed again about making a request to the authorities to have the domestic violence charges dismissed.

On cross-examination, Calderon testified that when he interviewed Melinda Minorics on February 10, 2017, she characterized her dating relationship with Tonner as being "off and on".

Attorney Cige established that at the time of the investigation of Tonner, both Calderon and Tonner were seeking promotion to the same position. However, he could not demonstrate that any particular action undertaken by Calderone was specifically motivated by a desire to undermine or sabotage Tonner's chances of being promoted.

Calderone clarified that he was asked to conduct an investigation of Tonner, not to decide whether Tonner had violated a D.O.C. policy.

Calderone testified that he was not asked to investigate the source of the January, 2017 anonymous call about Tonner. He also could not elaborate about the vetting of such calls.

Attorney Cige noted and Calderone agreed that Tonner had stated during the video that Duane Grade told him to write the letter to Chief Alfonso. Calderone admitted that he did not question Grade about whether or not he had told Tonner to write the memo.

Attorney Cige established that Calderon was aware that Tonner was eventually transferred back to EMCF even though Minorics was still working there. Then he asked Calderon whether he knew if anyone voiced an opinion about whether this would violate the policy mentioned earlier, which supposedly prohibited people in relationships from working in the same facility. Calderone did not know if anyone expressed that opinion.

In answer to a broader question about whether his investigation determined if Tonner had violated a personal relationship policy, Calderon answered in the affirmative, saying that Tonner could not (in July, 2016) stay working at EMCF if Minorics was working there. Pressing further on this line of questioning, Attorney Cige asked Calderon to point out the written policy that his investigation was premised upon. Calderon responded that he was not sure what the policy was. He stated that he never saw a written policy and never identified one during his investigation. Calderon admitted that his Report did not mention a written policy that Tonner was accused of violating.

Calderon testified on cross-examination that when he interviewed Melinda Minorics on February 10, 2017, she characterized her dating relationship with Tonner as being “off and on”.

On Re-Direct Examination, Calderone responded to Attorney Campbell’s questions about Minorics’ characterization about her relationship with Tonner as being “off and on”. He said that Minorics explained the fact that she and Tonner went on the cruise because it had already been paid-for; and she explained that they were both financially strapped and could not afford to live elsewhere; she said that Tonner paid her \$500 per month. She added that she was looking for another place to live and that her plans did not include Tonner.

Calderon testified that his job during the investigation was simply to find out whether Tonner was or was not still in relationship with Minorics.

There was no re-cross examination.

Analysis and Comments on Calderon's Testimony

Much of the substance of Calderon’s testimony came from the playing of the video recording of his February 10, 2017 interview of Sean Tonner. Calderon maintained that his purpose was not to make the case for convicting Tonner of the charges, but rather his task was only to gathering factual information from Tonner regarding the Tonner-Minorics relationship, specifically when that relationship was ongoing and when that relationship was not ongoing or “ended”. According to Calderon, this factual information would be used by others to decide the question of whether Tonner had lied to Alfonso when Tonner wrote his July 12, 2016 letter.

Despite Calderon's stated purposes, I noted that Calderon’s questions were not oriented to gathering information, but rather were formulated to trap Tonner into making damaging admissions. Calderon, like Grade and Alfonso, assumed that there was a

policy in place which prohibited an SID Investigator (like Tonner) from working in the same workplace as a civilian employee (like Minorics), with whom the SID Investigator has a consensual personal relationship. Tonner's testimony showed that he did not accept this assumption and he stated that he was unaware of such a policy until Alfonso brought it to his attention in July, 2016 after the Tonner-Minorics domestic violence incident. When Calderone presented Tonner with his signed receipt for the December 30, 2002 R-7 Policy, Tonner correctly noted that the R-7 Policy concerned itself with circumstances different from those for which he was charged, but the transcript setting forth the contents of the video-recorded interview clearly shows that Calderon cut-off Tonner's point and refused to allow him to complete his thought. I note that the points that Tonner was trying to relate to Calderone constitute the pivotal defects in the D.O.C.'s case against Tonner: (1) that the R-7 Policy concerned the prohibition of supervisor-subordinate relationships with family members or people with whom the supervisor was involved in a consensual personal relationship. That is to say, the R-7 Policy did not concern itself with relationships involving D.O.C. employees who were outside the supervisor-subordinate (or chain-of-command) relationship; and (2) that there was no written policy prohibiting D.O.C. employees or SID investigators from working in the same workplace (facility) with civilian employees with whom they had a familial or consensual personal relationship. In sum, Calderon's interview was conducted on a false premise, was unnecessarily argumentative, accusatory and sarcastic, and did not actually uncover additional information that could be useful to a neutral person who seeks to objectively evaluate the merits of the matter.

Review and Analysis of the Testimony of Chief Investigator Manuel Alfonso, (Now Retired)

The initial substantive question put to Chief Manuel Alfonso ("Alfonso") was whether he was familiar with this case. His response was that he knew that Tonner was disciplined as the result of a letter which he sent to him which ultimately was found to be untruthful. He then explained that Tonner was assigned to EMCF and was the victim of a domestic violence incident involving his girlfriend, who also worked at EMCF. The follow-up question to Alfonso was "And when you found out about that, what had to be

done?" He responded that Tonner and Minorics had to be separated for two reasons. Alfonso's first reason was because a Restraining Order had been issued. Alfonso's second reason was because (in his words) "our policy prohibits you from being assigned to an institution where anybody - either family member, loved one, girlfriend, boyfriend, uncle, anybody who could give the appearance of or lead somebody to believe that there might be some impropriety or put somebody in a predicament where they ... shouldn't be in either our investigator or a family member."

In response to additional questions, Alfonso testified that he determined that Tonner would be transferred to New Jersey State Prison in Trenton. He testified that Tonner approached him about the financial hardship that a transfer to Trenton would create. He went on to recount the conversation with Tonner, stating that he said he understood the financial repercussions of a divorce, but that he had no choice but to transfer him because there was a Restraining Order against Minorics and because allowing them to work in the same facility would violate D.O.C.'s policy. Alfonso was asked if Tonner ever actually transferred to Trenton. He responded that because Michael Cubic volunteered to go to Trenton in Tonner's place, Tonner was transferred to Mountain View Correctional Facility, where Cubic had been assigned.

Alfonso further testified that Tonner remained at Mountain View for about six or seven months (to December-January) and then he transferred Tonner back to EMCF. Alfonso testified that he transferred Tonner back to EMCF because Tonner had sent the July 12, 2016 letter to him stating that he and Minorics were no longer in a relationship. Alfonso identified the July 12, 2016 letter (R-6) and stated that he interpreted it as Tonner saying that the relationship between Tonner and Minorics had ended. Alfonso stated that because the Restraining Order was still in place, Tonner's return to EMCF did not take place until he received documentation that the "restraining Order" had been lifted. When Tonner returned to EMCF, Minorics was also still working there. Attorney Campbell asked Alfonso if he ever learned that the content of Tonner's July 12, 2016 letter was inaccurate. Alfonso responded by recounting that SID received an anonymous telephone call (in January, 2017) saying that Tonner and Minorics were still in a relationship. Alfonso pointed out that the D.O.C. does not prohibit its employees

from forming relationships with each other, but it does prohibit people who are in relationships with each other from working in the same facility. Alfonso testified that the investigation revealed the relationship had not ended, but Tonner had led him to believe that it had ended, and so, he was disciplined.

On cross-examination, Attorney Cige asked Alfonso what policy at the subject period of time (July, 2016) stated that two D.O.C. employees who were in a relationship, but who were not in the same chain of command, could not work at the same facility. Alfonso could not identify the policy, but he stated that it did indeed exist. When asked to identify the written document that prohibited people who were not in a supervisory relationship (situation) from working in the same facility, Alfonso referred to two authorities: the written State Ethics Code (marked as part of Tonner-1, which is discussed in the APPLICABLE LAW section of this Initial Decision, Roman Numeral II) and a "Departmental" policy. When Cige asked if SID had its own separate written policy, Alfonso reiterated that there was a "Departmental" policy, which covered SID, but Alfonso could not recall it and said it may have been covered in one or two emails.

Upon questioning by Mr. Cige, Alfonso testified that Minorics did not supervise Tonner. When asked if Tonner supervised Minorics, Alfonso responded that his answer would depend on how the word "supervise" was defined. He admitted that Minorics was not in Tonner's chain-of-command. He added that Minorics did not report to Tonner. However, he stated that Tonner's position as an investigator gave him the ability to influence decisions that Minorics could make or that her supervisors could make.

In answer to a question about Minorics and Tonner being in a landlord-tenant relationship, Alfonso responded that even that kind of financial relationship would violate the relationship policy, apparently alluding to the State Code of Ethics.

When asked if Alfonso recalled whether anyone asked Tonner to write the July 12, 2016 letter, Alfonso responded, "No, not that I recall." Finally, Alfonso testified that he did not make any inquiry into the motive behind the anonymous telephone tip saying, there is a motive behind every tip.

On Re-Direct examination by Ms. Campbell, Alfonso testified that it was not his job to interpret the State Ethics Code; that he did not ask Tonner to write the July 12, 2016 letter; and, that he understood the letter as Tonner saying that he was no longer in a relationship with Minorics.

Analysis and Comments on Alfonso's Testimony

As a matter of analysis and comment, the Tribunal again takes note of the fact that the D.O.C.'s interpretation of the R-7 Policy is broader than the actual text. The Tribunal also notes Chief Alonso's reliance on a "policy" which he was unable to identify (except in a vague reference to "one or two emails") or to produce. Despite his inability to produce the text of the alleged "policy" supporting his position, Alfonso, citing the sensitive nature of SID's work, stated (on p. 60) of his testimony that SID had a "policy" and that this *"policy prohibits you from being assigned to an institution where anybody – either family member, loved one, girlfriend, boyfriend, uncle, anybody could give the appearance or lead somebody to believe that there might be some impropriety or put somebody in a predicament where they ... shouldn't be in either our investigator or a family member."* (Emphasis supplied.) However, as noted above, when challenged to produce the actual, written policy saying this, Alfonso was unable to do so. Alfonso engaged in the same *non sequitur* reasoning as Grade.

Review of the Testimony of Nikiva Harris, Personnel Assistant-1

Nikiva Harris testified that she has worked for the D.O.C. for one year and that her job was to oversee recruitment, staffing and payroll functions. She added that in the course of her job duties, she had access to employee's personnel records. She identified Human Resource Bulletin 84-17 (R-12) and Sean Tonner's Work History (R-15).

Ms. Harris explained the nature of the charges that were pending against Tonner in this matter and explained the concept of progressive discipline.

On cross-examination, Ms. Harris did not know if the concept of progressive discipline encompassed the penalty of demotion.

Review and Analysis of the Testimony of Sean Tonner, (formerly Senior Investigator and currently Corrections Sergeant)

Sean Tonner began his career at the D.O.C. in 1995. He was promoted to Sergeant in 2001 and was promoted to Senior Investigator in 2006.

In regard to Melinda Minorics, Tonner testified that she was a civilian employee and was already employed at EMCF before he joined the D.O.C. Tonner testified that he was never Minorics's supervisor. Around 2010, while he was going through a divorce, his and Minorics's job duties brought them into contact and they started to date. In 2011, they leased an apartment together and were in a personal relationship. Her children resided with them.

Tonner testified that on July 2, 2016, Minorics came home from a family party and she was angry. She beat-up Tonner and he called the police, who arrested Minorics. He stated that there was no Restraining Order, *per se*, but that the Probation agency's instructions prohibited Minorics from having contact with him. Later on in his testimony, Tonner stated that a few days after the domestic violence incident he received a telephone call from Chief Alfonso informing him that he was being transferred to Trenton immediately. Then, Assistant Chief Duane Grade called Tonner and said that if Tonner would write a letter to Alfonso, he (Grade) would speak to Alfonso about the transfer. Tonner was not sure if he should write the letter, but his immediate supervisor (Jerome Scott) told him that Grade was waiting for it. So, Tonner wrote the letter. A few days later, Grade called him and told him that he would not be transferred to Trenton, but he would be transferred to nearby Mountain View Correctional Facility (EMCF). Tonner stayed at MVCF until Alfonso ordered him to transfer back to EMCF in December, 2016. Tonner testified that he told Alfonso in December, 2016 that Minorics worked at EMCF, that they shared the same residence,

and that he had misgivings about returning to EMCF because of the policy against working in the same facility with someone with whom he lived. Tonner testified that Alfonso threatened to charge him with insubordination if he did not comply with the order to transfer back to EMCF. Tonner testified that he returned to EMCF shortly after New Year's Day of 2017 and the charges, which are the subject of this matter, were brought against him in February, 2017. Tonner testified that on February 17, 2017 (three days after the drafting of the February 14, 2017 PNDA), he had a conversation with Grade, Alfonso and Adrian Ellison (the Union representative), during which he was told that his July 12, 2016 letter was false and that he actually maintained a personal, financial, and/or landlord-tenant relationship with Minorics contrary to the content of his letter. When asked what policy he violated, Tonner responded that he was told that "[A]n *investigator* cannot date another individual (employed by the D.O.C)". (Emphasis supplied.)

Tonner testified that between the July 2, 2016 domestic violence incident and the January, 2017 time period when the anonymous telephone tip was called-in to SID, he and Minorics communicated with each other and that Minorics and her daughter were able, in around October, 2016, to move back to the house where Tonner was residing. Tonner stated that in November, 2016, the court dismissed the assault charges pending against Minorics. He testified that from July 2, 2016 forward there was no personal relationship, even after Minorics moved back into the house. However, he testified that it was only around the Christmas Holidays of 2016 that they started to discuss whether to be together again (i.e., in a consensual personal relationship).

On cross-examination by Ms. Campbell, Tonner testified that there was no romantic or personal relationship between him and Minorics between July 2, 2016 and the date of the letter, July 12, 2016.

Campbell questioned Tonner about several emails, which seemed to indicate that they were not merely in a landlord-tenant relationship, but rather had a personal relationship. Campbell pointed out a July 7, 2016 email (only five days after the domestic violence incident and only five days before the writing of the July 12, 2016

letter) in which Tonner proposed going to the beach with Minorics. Tonner answered by explaining that he was confused about the assault and wanted to talk it over with Minorics. He added that the beach was their favorite spot. In response to questions about he and she exchanging emails about getting together for lunch, Tonner acknowledged that several such lunches were discussed, but only a few actually took place. In response to a question about celebrating an anniversary by having ice cream cake together, Tonner explained that it was not a personal anniversary, but rather it was Minorics's employment anniversary with D.O.C. Pointing to an email where Tonner told Minorics that a "woman" placed a note on his lunch pail and wondering if Minorics would be jealous and that Minorics made a comment about lipstick and "kissy lips", Tonner explained that the woman who placed the note was actually Minorics herself and that they were simply engaging in casual talk.

Switching to Tonner's testimony about his assertion that Duane Grade urged him to write the letter to Alfonso, Tonner reiterated on cross-examination that this was so. Tonner reiterated that Grade agreed with him that it was unfair that he (Tonner), who was the victim of the assault, was the one being penalized by being transferred. Tonner further stated that Grade did not tell him what words he should use, but he indicated generally what needed to be expressed in the letter to Alfonso about his situation. Grade stated that he would then speak with Alfonso about the transfer.

Tonner had testified that around Christmas of 2016, he and Minorics were contemplating a resumption of their personal relationship. Ms. Campbell confronted Tonner on this "re-kindling" of the relationship with a direct question asking him to state candidly whether he was or was not involved in a personal relationship with Minorics at the time of the February 10, 2017 Interview. Tonner responded that the answer was "both". Having already testified that the assault charges were dropped in November, he explained that around the Christmas Holidays the situation with Minorics improved. However, after his return to EMCF in January and after he learned that he would face charges due to the January, 2017 anonymous phone call, he told Minorics that the relationship was "off" because he did not want to lose his job. Tonner reiterated that he had told Alfonso that he did not want to return to EMCF because Minorics was in the

house; that he did not want trouble with the D.O.C.; and that after being ordered to transfer to EMCF he was brought up on charges.

The final question put to Tonner on cross-examination was, "Did you falsify this report?" Tonner responded in the negative.

Analysis and Comments on Tonner's Testimony

Tonner testified that his consensual personal relationship with Minorics was "off" after she assaulted him, but that he kept up dialogue with Minorics to try to understand their situation. I found Tonner's answers to questions based on the numerous phone conversations and the contents of emails exchanged between Minorics and himself to be candid. Tonner explained why some of the emails contained casual talk and light-hearted familiarity. However, such talk, even if friendly, does not necessarily imply that the speakers are in a romantic relationship. Tonner testified that he knew that when phone calls were made using State-issued telephones there would be a record of the caller and of the receiver of the call and of the length of the phone call. He testified that he was also aware that the content of the emails exchanged between himself and Minorics would be readable by State officials. His awareness of these facts makes it unlikely that he had intended to hide his communications with Minorics or her communications with him. This suggests that Tonner did not intend to deceive his superiors into thinking that his relationship with Minorics was "off" when it was really "on". Overall, Tonner's testimony indicates exactly what Tonner testified to: that, despite the fact that they engaged in phone calls and emails, he and Minorics were not in a consensual personal relationship from the time of the assault on July 2, 2016 up until December, 2016 when they started talking about resuming their consensual personal relationship, and that they were still not in a consensual personal relationship when they were each interviewed by Calderon on February 10, 2017.

Tonner's testimony made it clear that his superiors told him that there was a policy in place which made his transfer mandatory because he was living with Minorics.

It is also clear that a written policy mandating Tonner's transfer was never produced during the investigation, before the hearing, or at the hearing. It appears that Tonner simply accepted his superiors' assertion that there was indeed a policy providing that people who were involved in consensual personal relationships were not allowed to work with each other. Tonner did not demand to see that policy until February 10, 2017, when Tonner challenged Calderon to show him the policy that he allegedly violated. Calderone never produced the policy, simply ignored Tonner's point and moved on to further questions.

Tonner's testimony indicates that Tonner: (1) trusted his superiors when they told him that there was a policy stating that he could not work in the same facility as Minorics and that he had to be transferred; (2) followed the procedures prescribed to him regarding the impending transfer, (i.e., he followed Grade's suggestion to write a letter to Alfonso explaining the hardship that a transfer to Trenton would cause him); (3) fearing that he might run afoul of the (non-existent) "policy" by returning to EMCF, Tonner advised Alfonso that Minorics worked at EMCF and that he did not want to violate said "policy".

Tonner's testimony has the ring of truth. It is clear that Tonner sought to comply with the D.O.C.'s rules and that he was not seeking to avoid compliance.

FACTUAL DISCUSSION AND FINDINGS OF FACT

Having had the opportunity to review the testimony of the various witnesses, to assess their credibility, as well as the opportunity to review all the exhibits, and to evaluate the arguments of counsel, I make the following findings of **FACT**.

1. I **FIND** that charges were brought against Tonner and discipline was imposed upon Tonner because of facts alleged against him arising out of his sending of the July 12, 2016 letter to then-Chief Alfonso. I **FIND** that the D.O.C. argued that the July 12, 2016 letter contained false and / or misleading information and that the Hearing Officer in the Departmental hearing accepted the D.O.C.'s argument and determined

that the letter contained false and / or misleading information. However, I **FIND** that both Tonner and Minorics (as quoted in the interview with Calderon) satisfactorily explained the off – on – off - on again nature of their relationship over time. I **FIND** that the D.O.C.'s evidence (the testimony, the phone records, the emails) established that there were communications between Tonner and Minorics during the period July 2, 2016 through July 12, 2016, but the D.O.C. did not establish by a preponderance of the credible evidence that Tonner and Minorics were actually in a consensual personal relationship during the period of July 2, 2016 through the date of the writing of the letter, July 12, 2016. Moreover, I **FIND** that the preponderance of the credible evidence (Tonner's Testimony) demonstrates that the July 12, 2016 letter, when written, told the truth about Tonner's relationship with Minorics, i.e., that on July 12, 2016, they were not in a consensual personal relationship and so, the letter did not contain false and / or misleading information.

2. I **FIND** that the "New Jersey Department of Corrections. Policy Prohibiting Familial and Consensual Personal Relationships Between Supervisors and Subordinates, a/k/a "the Policy" or "the policy in R-7" or the "R-7 Policy" prohibits D.O.C. supervisors from supervising subordinates ("subordinates" being people in the same chain-of-command as the supervisor, per the definition of "subordinate" in the R-7 Policy) who are people with whom they have a familial relationship or a consensual personal relationship, as those terms are defined therein.

3. I **FIND** that the actual text of the R-7 Policy does not prohibit people who are not connected to each other in a supervisor-subordinate workplace relationship from working in the same location. I **FIND** that, under the R-7 Policy, D.O.C. personnel, who are not in the same chain-of-command cannot be considered as being in a supervisor-subordinate workplace relationship. I **FIND** that such people are unaffected by the R-7 Policy and therefore do not need to report to their superiors that they work in the same workplace.

4. I **FIND** that the R-7 Policy does not prohibit D.O.C. investigators from working in the same facility as someone with whom they have a familial or a consensual

personal relationship merely because of said familial or consensual personal relationship.

5. I **FIND** that in regard to the "New Jersey Department of Corrections, Policy Prohibiting Familial and Consensual Personal Relationships Between Supervisors and Subordinates", a/k/a "the Policy" or "the policy in R-7" or the "R-7 Policy", Chief Alonso's testimony demonstrates that his position (i.e., his interpretation of the requirements of the Policy) was that anyone related by blood or marriage or who were living together in a personal relationship could not work in the same workplace, and that if they did work in the same workplace, then the supervisor must be transferred to another D.O.C. location. I **FIND** that Chief Alfonso's reading of the R-7 Policy (i.e., interpretation of the Policy) was inaccurate because the R-7 Policy only covers those in a supervisor-subordinate relationship (i.e., people in the same chain-of-command) rather than "anybody" in the workplace who happens to be related to "someone" in the same workplace. Particularly, I **FIND** that Tonner and Minorics were not at any time in the same chain-of-command. I also **FIND** that Tonner and Minorics were not at any time in a supervisor-subordinate work situation.

6. While the New Jersey Uniform Code of Ethics, N.J.S.A. 52:13D-23 provides that supervisors are prohibited from supervising family members, business partners, roommates or cohabitants and someone the supervisor is dating, I have already found that Tonner never supervised Minorics and Minorics never supervised Tonner. Therefore, I **FIND** that under the language of both the R-7 Policy and of the Uniform Ethics Code, there was no requirement for Tonner to report his relationship with Minorics and I **FIND** there was no reason for him to be transferred due to his consensual personal relationship with Minorics.

7. I **FIND** that Chief Alfonso's belief (that because Tonner and Minorics had a consensual personal relationship, it was therefore required that Tonner, as the "supervisor" must be transferred) was an incorrect interpretation of the R-7 Policy and was an incorrect interpretation of Leila Lawrence, Esq.'s November 21, 2013, which referred to N.J.S.A. 52:13D-23, the New Jersey Uniform Ethics Code.

8. In regard to Attorney Krieger's question to Grade about how a member of SID could be considered a "supervisor", I **FIND** the supposed "authority" or "control" mentioned by Grade in his response is not grounded in any document presented to this Tribunal during the hearing and that he unduly expanded the text of the R-7 Policy to cover relationships beyond supervisor-subordinate and beyond people who were in the same chain-of-command. Moreover, I **FIND** that Chief Alfonso's testimony (on page 60) demonstrates that he too, without justification, expanded the R-7 Policy's wording when he stated that the Policy prohibited "anybody" from being assigned to an institution where any family member or where a girlfriend or boyfriend worked. I **FIND** that Senior Investigator Calderon's testimony (ps.179-180) also demonstrates that he misunderstood the Policy (i.e., He expanded the prohibition set forth in the Policy to encompass all employees rather than simply "supervisors" and "subordinates") and he even admitted that he never read the Policy.

9. I **FIND** that the D.O.C., during the hearing, did not demonstrate that the term "investigator" was the equivalent of the term "supervisor".

10. I **FIND** that the D.O.C. did not, during the hearing, demonstrate in any way and to any extent how an investigator became the equivalent of a supervisor of his or her co-workers, even during the pendency of an investigation.

11. During his initial direct testimony, Grade testified that he did not know if Alfonso had told him (Grade) to tell Tonner to write the letter, or whether Tonner's Principal Investigator had told him to write it. Grade also testified that he did not know if anyone told Tonner what to express in the letter. In contrast to this testimony, Tonner testified that Grade told him to write the letter, that Grade suggested what to express in the letter, and that Jerome Scott delivered the letter to Grade. I observed that it was interesting that Grade did not avail himself of the opportunity to rebut Tonner's assertions when Grade was called to the witness stand on rebuttal. For this reason, I **FIND** that Tonner's testimony was more candid, more consistent, and more reliable than Grade's testimony. Moreover, Tonner's candid testimony about the "on-off-on again" nature of his relationship with Minorics (explaining in detail the process by which he and

Minorics tried to repair their relationship over time) satisfactorily explained how and why their relationship was "off" on July 12, 2016, and so, I **FIND** that Tonner's testimony that the relationship was "off" (i.e., terminated) on July 12, 2016 was truthful.

12. I **FIND** that Tonner's testimony was more consistent, more certain, and made more sense than Grade's testimony, and so, I **FIND** that Tonner was the more credible witness.

DISCUSSION

I have made findings of fact and the following discussion of those findings and their bearing on the outcome of this matter follows. I have found that Tonner's July 12, 2016 letter was true when it was written, i.e., Tonner and Minorics were no longer in a consensual personal relationship at that time. I have found that Tonner was truthful when he stated that he and Minorics had conversations on the telephone and via texts and emails after July 12, 2016 at times when they were out of a consensual personal relationship, at times when they were contemplating resumption of their consensual personal relationship statement, and when they were actively seeking to repair their consensual personal relationship.

I have found that the testimonies of Grade, Calderon and Alfonso demonstrate that all three of them (1) had not read and / or understood the applicable R-7 Policy, (2) could not produce a written policy from any source that specifically provided that an SID investigator could not work in the same workplace or facility as his civilian girlfriend, and (3) could not produce a written policy that specifically provided that it was mandatory that when an SID Investigator worked in the same workplace or facility as his civilian girlfriend, the investigator had to be transferred.

What happened in this matter is that the above-mentioned D.O.C. officials all assumed that there was a valid policy in place - and written somewhere - which prohibited an SID investigator from working in the same workplace or facility as his civilian girlfriend and which also provided that he had to be transferred. What they

assumed to be a valid policy was actually not valid because there was no such written policy at all. They compounded their error by failing to search out, read, and correctly interpret the actual policy (the R-7 Policy), which only prohibited “supervisors” from supervising those “subordinates” in the supervisor’s chain-of-command with whom the supervisor had a familial or a consensual personal relationship. Then the D.O.C. officials further compounded their error by unjustifiably expanding the language of the R-7 Policy to construe SID Investigators as being the equivalent of “supervisors”.

In light of the fact that the D.O.C. was unable to produce a written policy that mandated that Tonner had to be transferred out of EMCF, it follows that there was no reason to transfer Tonner; no reason for Tonner to be asked to provide a letter or to provide any proof that he and Minorics were no longer in a consensual personal relationship; and no reason to conduct an investigation into whether Tonner and Minorics were ever in a consensual personal relationship. In short, since there was no policy prohibiting Tonner and Minorics from having and continuing their consensual personal relationship, it follows that Tonner could not have violated a non-existent policy. Moreover, since Tonner never violated the non-existent policy, he therefore could not make a false statement about violating it. Moreover, the statement he made about the state of his relationship with Minorics on July 12, 2016 was true when he wrote it.

In the final analysis, the charges against Tonner were based on false assumptions about a non-existent policy; were based on the misinterpretation of a real policy (the December 30, 2002 Memorandum, marked as R-7, the “R-7 Policy”) that was inapplicable to Tonner’s circumstances (i.e., There was no supervisor-subordinate work relationship between him and Minorics and they were never in the same chain-of-command); and the charge that the July 12, 2016 letter was false when written was proven to be meritless because Tonner told the truth when he wrote it.

CONCLUSIONS

The primary issue in this matter is whether Tonner's letter to then-Chief Alfonso dated July 12, 2016 contained false information (i.e., misrepresentations of material facts). I **CONCLUDE** that Tonner told the truth in his July 12, 2016 letter to Alfonso, and therefore the charges of Conduct Unbecoming and of Providing False Information to a superior cannot be sustained.

The secondary issue in this matter (if the letter did indeed contain misrepresentations of material facts) is whether Tonner provided false information in order to obtain a financial or personal benefit for himself (i.e., a more favorable assignment from his superior). Having found that Tonner told the truth in his July 12, 2016 letter to Alfonso, I **CONCLUDE** that there is no basis to sustain the charge of Conduct Unbecoming and of Providing False Information to a superior in order to obtain a financial or personal benefit for himself.

The D.O.C. has attempted to demonstrate that investigators become "supervisors" when, during the course of an investigation, they interrogate members of the facilities where they are assigned to work. It appears to me that the D.O.C.'s purpose was to expand the definitions of "supervisor" and "subordinate" beyond the bounds set forth in the Memorandum and the Policy set forth in R-7 in order to establish that Tonner was somehow "supervising" Minorics, even though in the course of his regular duties he did not supervise her, or exercise regular control over her. The D.O.C. also appeared to be trying to establish that Tonner was Minorics' supervisor, even though she was clearly outside his chain-of-command. This attempt to expand the scope of the policy is impermissible since the definitions of "supervisor" and "subordinate" are clearly set forth. Moreover, the word "regularly" and the term "chain-of-command" further demarcate and limit the scope of the terms "supervisor" and "subordinate". The only difference set forth in the R-7 Policy for SID supervisors, as opposed to other supervisors in the D.O.C., is that SID supervisors must report the subject relationships to the Chief Investigator of SID rather than to the Administrator. From this, I **CONCLUDE** that if Tonner, in the course of his regular duties, did not

regularly supervise someone in Minorics's position, then they would not be in a supervisor-subordinate working relationship and there would be no need for anyone to be transferred. Having already found that that Tonner did not supervise Minorics and that Minorics was not in Tonner's chain-of-command, it follows, and I **CONCLUDE**, that there was no prohibited working relationship between them and so there was no need for Tonner to be transferred. I further **CONCLUDE** that even if Tonner were conducting an investigation inside EDCF, there is nothing in the R-7 Policy that would require that he be transferred to another facility.

In regard to attorney Krieger's question to Grade about how a member of SID could be considered a "supervisor" and his response encompassing an investigator's supposed "authority" or "control", I **CONCLUDE** that the supposed "authority" or "control" which Grade talked about is not and cannot be derived from the definitions of the term "supervisor" or the term "subordinate", as set forth in the R-7 Policy.

I **CONCLUDE** that this supposed "authority" or "control" is not and cannot be derived from any of the documents presented to this Tribunal during the hearing. I **CONCLUDE** that this supposed "authority" or "control" was derived from the D.O.C.'s witnesses' unwarranted, baseless, and unjustified broadening of the wording of the R-7 Policy.

I **CONCLUDE** that the D.O.C.'s witnesses, wittingly or unwittingly broadened or expanded the term "supervisor" and the term "subordinate".

The Tribunal notes Chief Alonso's reliance on a "policy" which he was unable to identify (except in a vague reference to "one or two emails") or to produce. Despite his inability to produce the text of the alleged "policy" supporting his position, Alfonso cited the sensitive nature of SID's work, and stated (on p. 60) of his testimony that SID had a "policy". To use his words, this "policy prohibits you from being assigned to an institution where *anybody* – either family member, loved one, girlfriend, boyfriend, uncle, anybody who could give the appearance or lead somebody to believe that there might be some impropriety or put somebody in a predicament where they have - where they

shouldn't be in either our investigator or a family member." (Emphasis supplied.) The problem with his testimony is that he did not produce a written copy of this supposed "policy". I **CONCLUDE** that the R-7 Policy wording is limited only to "supervisors" ("supervisors" being a narrower category than "anybody"), who has a familial relationship with or who have a consensual personal relationship with someone who is a "subordinate". I **CONCLUDE** that Chief Alfonso, engaging in the same *non-sequitur* as Grade, mis-read the R-7 Policy, giving it an overly broad interpretation.

I found that the D.O.C. officials incorrectly assumed that there was a policy in place which prohibited an SID investigator from working in the same workplace or facility as his civilian girlfriend and which also provided that he had to be transferred. In point of fact, the D.O.C. failed to produce the alleged policy and so, I found that there was no such policy. Since no such policy existed, it follows, and I **CONCLUDE**, that Tonner cannot have violated a non-existent policy. Moreover, Tonner told the truth about his relationship with Minorics as of the date (July 12, 2016) that he wrote the letter to Alfonso, and so, I **CONCLUDE** that he did not violate any obligation to communicate candidly and truthfully to his superiors.

ORDER

Based upon the foregoing, it is on this Twenty-Eighth (28th) day of October, 2021

ORDERED that the decision of the hearing officer in the Departmental hearing be and hereby is **REVERSED** ; and it is further

ORDERED that the discipline imposed upon Tonner, including the imposition of the suspension and the demotion of Tonner from Senior Investigator to Corrections Sergeant be immediately rescinded;

ORDERED that Tonner be immediately restored to his former rank and the record of disciplinary action imposed on him be stricken and otherwise corrected; and it is further

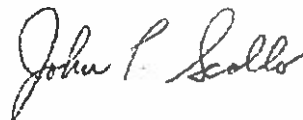
ORDERED that all back pay and benefits that should have accrued to Tonner be immediately calculated and restored to him; and it is further

ORDERED that a copy of this **ORDER** shall be served upon all parties within seven (7) days of the date set forth herein.

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.



October 28, 2021 _____
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

db

APPENDIX

List of Witnesses

Appellant's Witness:

Sean Tonner

Respondent's Witnesses:

Duane Grade, Deputy Chief

David Calderone, Principal Investigator

Manuel Alfonso, Chief

Nikiva Harris, Human Resources Personnel Assistant-One

List of Exhibits

Appellant's Exhibits:

Tonner-1 Packet containing New Jersey's Uniform Ethics Code (N.J.S.A. 52:13D-23);

Transcript of the DOC Hearing held on 4/20/2017; papers relating to apartment rental

Respondent's Exhibits:

R-1 PNDA dated 2/14/17 and FNDA dated 5/25/17, 4 pages

R-2 Investigative Report authored by David Calderone dated 2/14/17, 6 pages

R-3 NJDOC Call Log, dated 1/9/17, 12 pages

R-4 Packet of Email exchanged between Sean Tonner and Melinda Minorics, July, 2016 to December, 2016, 48 pages

- R-5 Packet of (photocopies of) photos, 8 pages
- R-6 Letter (a/k/a "memo") from Sean Tonner to Manuel Alfonso dated 7/12/2016, one Page
- R-7 NJDOC "Memorandum" and "Policy Regarding Familial and Consensual Personal Relationships" both dated 12/30/2002, 7 pages
- R-8 NJDOC "Policy Regarding Familial and Consensual Personal Relationships" - Receipt Form signed by Sean Tonner, dated, 1/9/2003, one page
- R-9 Memorandum authored by EED Director Leila Lawrence, dated November 21, 2003, 3 pages
- R-10 Memorandum authored by EED Director Leila Lawrence, dated September 25, 2017, 3 pages
- R-11 Law Enforcement Rules and Regulations, 20 pages
- R-12 Human resources Bulletin, 84-17, 17 pages
- R-13 Sean Tonner's training Summary report, 7 pages
- R-14 Weingarten Administrative Rights signed by Sean Tonner, dated February 10, 2017, one page
- R-15 Sean Tonner – Work History
- R-16 Special Investigation Video of Sean Tonner, dated 2/10.17
- R-17 Audio of Special Investigations Division Interview of Melinda Minorics, dated 2/10/17, 1 CD
- R-18 Special Investigations Division Surveillance video of 234 South Kathryn Street, Palmer/Easton, Pennsylvania, DVD [NOT in Evidence]

Court Exhibits:

- Court – 1 Letter from Karen Campbell, Esq. to John P. Scollo, ALJ, cc: Brian Cige, Esq. regarding witness list and proposed Stipulation of Facts
- Court - 2 Letter from Karen Campbell, Esq. to Brian Cige, Esq dated March 28, 2018 containing Respondent's First request for Answers to Interrogatories and Production of Documents