STATE OF NEW JERSEY

In the Matter of Robert Melendez, Department of Corrections	:	**DECISION OF THE CIVIL SERVICE COMMISSION**
CSC DOCKET NO. 2016-3473 OAL DOCKET NO. CSV 5175-16	:	

ISSUED: JUNE 9, 2021 (ACM)

The appeal of Robert Melendez, a Principal Investigator, Parole and Secured Facilities, with New Jersey State Prison, Department of Corrections, of his 30-working day suspension and demotion, on charges, was heard by Administrative Law Judge Elia A. Pelios (ALJ), who rendered his initial decision on May 11, 2021. Exceptions were filed on behalf of the appellant, and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on June 2, 2021, accepted and adopted the Findings of Fact as contained in the attached ALJ's initial decision. The Commission adopted the recommendation to uphold the 30-working day suspension but did not adopt the recommendation to uphold the demotion to Senior Correctional Police Officer. Rather, the Commission modified the demotion to Senior Investigator, Parole and Secured Facilities.

DISCUSSION

The appellant received a 30-working day suspension and was demoted to the title of Senior Correctional Police Officer on charges of insubordination, conduct unbecoming a public employee, other sufficient cause, and violation of a rule, regulation, policy, procedure, order or administrative decision. Specifically, the appointing authority alleged that the appellant failed to follow an order to close an investigation and failed to follow procedures in handling confidential information.

Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In his initial decision, the ALJ set forth that on January 5, 2016, the Director of Operations for the Department of Corrections was notified by an individual outside her chain of command of an issue in the inventory at the New Jersey State Prison involving needles and medicine. She attempted to bring the matter to her supervisors, who are the Assistant Commissioner and the Commissioner, but was unable to reach either. Therefore, the Director of Operations made the decision to order searches of contract medical staff leaving the premises at the end of their shift. The appellant became aware that searches were being conducted and he began an investigation into the matter. The appellant spoke with the Chief Investigator on January 6, 2016 and January 8, 2016 who advised him to end the investigation. The appellant was uncomfortable with this direction and the Chief Investigator offered to send him the directive in writing. The Chief Investigator sent the appellant the directive to end the investigation on January 11, 2016, and on January 14, 2016, the appellant closed the investigation. On January 27, 2016 the appellant sent an email to the Chief Investigator asking him if he wanted a copy of his report. This raised concerns with the Chief Investigator that the appellant continued to work on the investigation after he ordered it closed.

The ALJ concluded that all of the witnesses agreed that the Chief Investigator verbally told the appellant to close the investigation on January 8, 2016 and in writing on January 11, 2016, and that there was no dispute that he closed it on January 14, 2016. While the specifications against the appellant indicated that he was told by the Chief Investigator to cease investigating the matter on January 5, 2016, the appellant asserted that they did not speak on that date. The Chief Investigator credibly testified that the January 5, 2016 date was a typographical error. Therefore, the ALJ found the first time the Chief Investigator spoke to the appellant about the matter was January 6, 2016. The ALJ also found that the appellant believed he had been told to stop the investigation on January 6, 2016. This finding was based on the appellant's recording of his phone conversation with the Chief Investigator on January 8, 2016, his concern with protecting himself in the event the chief retired, and his own description during his testimony of the extreme reaction after speaking with the Chief Investigator on January 6, 2016. The ALJ rejected the appellant's contention that the order of the Chief Investigator was imprecise or otherwise unclear as unpersuasive as his subsequent behavior belied that assertion. As such, the interviews the appellant conducted on January 7, 2016 and January 8, 2016 occurred after he was ordered to cease the investigation on January 6, 2016. Accordingly, the ALJ sustained all of the charges against the appellant. While the appellant had an insignificant disciplinary history, the ALJ determined that the appellant's demonstrated lack of ability to appreciate the appropriate exercise of discretion in handling sensitive matters present in the Special Investigations Division (SID) and the severity of the

sustained charges warranted the suspension and demotion.

In his exceptions, the appellant argues that the appointing authority failed to prove the specifications on the charging documents and claims that the Chief Investigator concocted that the January 5, 2016 date was a typographical error. He also contends that the mistakes and misrepresentations in the Chief Investigator's testimony demonstrates that he lacked credibility. The appellant maintains that the ALJ did not analyze his credibility and that the weight of the totality of evidence demonstrates that any order to stop the investigation into lawful searches at that early stage was an unlawful order. Finally, the appellant states that the proposed penalty is excessive and that removal from SID is completely excessive when reviewing the totality of the circumstances.

In response, the appointing authority indicatets that the ALJ's credibility determinations are fully supported in the record and that the appellant's exceptions are without merit.

Upon its *de novo* review of the record, the Commission agrees with the Findings of Fact of the ALJ and concludes that the appointing authority has met its burden of proof in this matter. The Commission also agrees that the 30-working day suspension was proper. However, for the reasons set forth below, the Commission determines that the appellant's demotion to Senior Correctional Police Officer should be modified to a demotion to Senior Investigator, Parole and Secured Facilities.

The Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004).

In this case, the ALJ specifically indicated that the Chief Investigator stated on direct that he first spoke with the appellant on the matter a day or two after the searches occurred. He acknowledged during cross examination that identifying January 5, 2016 as the date he ordered the appellant to cease the investigation was

a typographical error. In this regard, the ALJ noted that the January 5, 2016 date originated in an email to a SID investigator on January 27, 2016 and the misstatement was carried forward in reliance on that email in the charging documents. Additionally, the ALJ indicated that the appellant's use of the phrase "I determined the investigation would continue," his concern with protecting himself, his decision to record the January 8, 2016 phone conversation and he appellant's own description of his reaction after speaking with the Chief Investigator evidenced that the appellant believed he was told to stop the investigation on January 6, 2016. However, the appellant continued the investigation after being given the order to cease on January 6, 2016. Therefore, the Commission finds that the appellant has not presented any evidence to disturb the ALJ's credibility determinations or his Findings of Fact. Accordingly, the Commission upholds all of the charges against the appellant.

In determining the proper penalty, the Commission's review is also *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In assessing the penalty in relation to the employee's conduct, it is important to emphasize that the nature of the offense must be balanced against mitigating circumstances, including any prior disciplinary history. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007).

In this case, the appellant's conduct in this situation demonstrates a failure of the exercise of discretion in handling of a sensitive matter. However, it cannot be ignored that the Chief Investigator testified that the appellant is a good investigator. Additionally, the SID investigator who looked into this matter testified that the appellant has worked with him on cases and found him to be professional and never knew him to be untruthful regarding the investigations he conducted. Similarly, the Deputy Chief Investigator also testified hat he never knew the appellant to be untruthful and that he was a good investigator. Further, the appellant has an unremarkable disciplinary history. While the Commission is cognizant of the seriousness of the sustained charges, these factors certainly bear on the severity of the penalty. Accordingly, the foregoing circumstances provide a sufficient basis to modify the appellant's demotion and place him in the title of Senior Investigator, Parole and Secured Facilities and to sustain the 30-working day suspension. *See N.J.S.A.* 11A:2-19 and *N.J.A.C.* 4A:2-2.9(d). This penalty should impress upon the appellant that further infractions will not be tolerated and

could lead to more severe disciplinary penalties, up to and including removal.

Since the demotion has been modified, the appellant is entitled to differential back pay, benefits and seniority pursuant to *N.J.A.C.* 4A:2-2.10 from the date of his demotion to Senior Correctional Police Officer to the date he is reinstated to the title of Senior Investigator, Parole and Secured Facilities. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), an award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. Mar. 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this case, the Commission upheld the charges against the appellant, imposed major discipline, and ordered a demotion. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Superior Court of New Jersey, Appellate Division's decision, *Dolores Phillips v. Department of Corrections,* Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in *Phillips, supra,* if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to Senior Investigator, Parole and Secured Facilities position.

ORDER

The Commission finds that the action of the appointing authority in suspending the appellant for 30-working days was justified but the demotion to Senior Correctional Police Officer was not justified. The Commission therefore modifies the demotion to the title of Senior Investigator, Parole and Secured Facilities. The Commission further orders that the appellant be granted differential back pay, benefits and seniority from the date of his demotion to Senior Correctional Police Officer through the day of his appointment to the title of Senior Investigator, Parole and Secured Facilities. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's appointment to the title of Senior Investigator, Parole and Secured Facilities be delayed pending resolution of any potential back pay dispute.

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2ND DAY OF JUNE, 2021

Deirdré 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
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 5175-16
AGENCY DKT. NO. 2016-3473

IN THE MATTER OF
ROBERT MELENDEZ, NEW JERSEY STATE PRISON,
DEPARTMENT OF CORRECTIONS.

Michael C. Mormando, Esq., for appellant (Attorneys Hartman, Chartered, attorneys)

Tamara L. Rudow, Esq., for respondent

Record Closed: May 23, 2019 Decided: May 11, 2021

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

In this matter, appellant Robert Melendez (Melendez) challenges his thirty working day suspension and demotion from Principal Investigator to his last civil service title, Senior Correctional Police Officer, by respondent New Jersey Department of Corrections (NJDOC, Department) for engaging in conduct constituting violations of N.J.A.C. 4A:2-2.3(2) (Insubordination), N.J.A.C. 4A:2-2.3(6) (Conduct Unbecoming a Public Employee), and N.J.A.C. 4A:2-2.3(12) (Other Sufficient Cause), specifically, Human Resource Bulletin 84-17 C(9), insubordination, C(11), Conduct Unbecoming an Employee, and E(1) Violation of a rule, regulation, policy, procedure, order or administrative decision, for

Melendez felt that the searches violated the rules of procedure and possibly even criminal law. The chief asked him to give him internal management procedure documents. The chief spoke to the Commissioner on the phone and then called back. The chief told Melendez that the search was a violation and said that the Commissioner took point on the matter and said that if SID opened a case, they could close the case. Melendez asked Alfonso if he was asking Melendez to cover up. The chief said he was not and told him to see what he could find out and get back to him. Melendez says that the chief never told him to stop investigating.

Melendez was flabbergasted. He said the Commissioner could not tell SID not to investigate. Melendez tried to see the chief but was told he would not be in until 11:00. On January 7 Melendez interviewed six people who had been searched. On January 8 Melendez conducted one more interview and spoke to the chief. He recorded the conversation. The call was made regarding another case involving confiscated tainted medicine Melendez was paid overtime to seize. Inmates received potential opioids instead of blood pressure medicine. The chief wanted him to return tainted medicine to the medical department. Melendez was concerned because that had never been done before. That was what led him to record the phone call. During that phone call the chief told Melendez to stop the investigation at issue in this matter. The chief advised that if Melendez sent the chief a case memo and number, he would send Melendez an email to stop the investigation, which he did on January 11, 2016. (R-2.)

Melendez did not close the case for the next few days. He was out of the office on other matters. January 14, 2016 was the first time that he could close the case and he did. He submitted his report into the database redacted part. The unredacted copy was kept on his computer. He also kept the phone call recording on his handheld voice recorder. He filed a complaint about not being in the loop and the chief chastised him.

On January 27, 2016, in the morning meeting the deputy commissioner called in to the assistant administrator. Melendez could hear him talking about the report on the search from January 5. He told Melendez he was not supposed to hear that and told him his boss would reach out to him. Melendez then called the chief who told him to send the report which he did. The chief was not happy with him. The next morning the deputy chief came and asked for his files.

failing to follow an order to close an investigation and for failing to follow procedure in handling confidential information.

PROCEDURAL HISTORY

On March 16, 2016, the Department issued a final notice of disciplinary action (FNDA) sustaining the charges set forth in the PNDA, suspending Melendez for thirty days and demoting him from Principal Investigator to his last civil service title, Senior Correctional Police Officer. Appellant appealed his discipline to the Civil Service Commission (Commission), which filed the matter at the Office of Administrative Law (OAL) on April 5, 2016, for a contested case hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was heard on October 3, 2017, October 5, 2017, November 19, 2018, and February 25, 2019. The record was held open to allow the parties to submit closing briefs and was closed on May 23, 2019.

FACTUAL DISCUSSION

The first witness to testify was Manuel Alfonso (Alfonso). He is currently retired but had been employed by the Department of Corrections for twenty-eight years, eighteen of those years were spent with the special investigations division (SID). For two years he served as the chief investigator for the Division. He retired on May 1, 2017.

Alfonso discussed his training. He currently works for a private company. SID is involved at all institutions under the NJDOC and performs all administrative and criminal investigations for the NJDOC. He reported directly to the commissioner. He notes that the NJDOC is a paramilitary organization and that most of the orders given are verbal. Hundreds of directives are given per day. It is impossible to presume that all orders and directives are given in writing. Alfonso reports to the Commissioner of the Department of Corrections and to the Director of Legal and Regulatory affairs.

Alfonso is familiar with Melendez, having worked with him. Melendez was in the SID the majority of time that Alfonso was there. He referred to a report by Edward Soltys (R–2). Alfonso received a call from Melendez that a search of nursing staff was performed at the New Jersey

State Prison due to missing needles in the inventory. The investigation and search were not performed through SID. Alfonso called the Commissioner. SID was never notified but should have been. The decision to conduct the search was made below the Commissioner. He discussed the matter with the Commissioner and with legal affairs. It was agreed that no further investigations were needed. The matter was handled internally. He states that the individual involved in making the decision did not work for him so he was not privy to any discipline that may have been imposed.

Alfonso told Melendez that there was no need to continue the investigation. Melendez's reaction was conspiratorial in nature. Alfonso was taken aback by Melendez's reaction and told him to close the investigation. He notes that administrative violation is not a crime and there is no shortage of work at the New Jersey State Prison and so it was important not to waste resources. Anyone entering the institution grounds is subject to a search. Even if SID had been involved such individuals still would have been subject to search.

The search had been conducted on January 5, 2016. Alfonso's conversation with Melendez occurred a day or two later.

A few weeks later Alfonso received an email from Melendez on January 27, 2016 asking if Alfonso wanted Melendez to forward his report to the assistant Commissioner. This appeared to Alfonso that Melendez had never stopped his investigation despite Alfonso's order. Alfonso ordered the file confiscated and reviewed. He learned it included redacted documents. He had Melendez reassigned to central headquarters and confiscated his computer to see if there was evidence of more insubordination.

Alfonso learned that Melendez took it upon himself to continue the investigation despite being ordered to cease. There are avenues to address if an individual believes they received an illegal order and Alfonso notes that those procedures were not followed in this instance. Melendez was not written up for anything but disobeying an order. It appeared Melendez continued the investigation on January 7 and January 8, 2016. Melendez was paranoid and wanted to know who ordered the searches and if the Commissioner knew. Alfonso told Melendez that if he was so paranoid, he would put the order in writing. He did so by sending an email to Melendez.

At this time a recording was played in the hearing of an interview which of Alfonso directing Melendez to do so. Alfonso acknowledged that it was him on the recording. He came to learn of the recording after forensic investigation of Melendez's computer. (R–3.) At the time of the conversation Alfonso did not know how much Melendez had continued to do since receiving the directive.

Alfonso states that he likes Melendez and states that he is a good investigator. Alfonso promoted Melendez to a principal investigator but believes that something snapped with him on this matter. He noted that the Mercer County prosecutor's office was consulted on the instance of the searches being performed. He dealt directly with the first assistant prosecutor who agreed with him that there was no criminal matter as a result of it. He states that after he received Soltys's report (R–2) he forwarded it to the Department's Director of Legal Affairs, Melinda Haley (Haley). Alfonso told her that he wanted to bring disciplinary charges against Melendez and get him out of the SID.

He reviewed IMP number 35 (R–6) regarding investigative procedures. At page 4 item L it discusses tape-recording confidential conversations. He reviewed another document that shows that Melendez received copies of rules and the handbook. (R–10.) He referred to the handbook (R–9) and noted that on page 8 item number four was violated. He also reviewed the rules and regulations (R-8) and says Melendez violated page 4 items A, B and C. A thirty-day working suspension was imposed and Melendez was demoted to a senior investigator Alfonso believes that the penalty is within reason.

Melendez reported for return to work on May 1, 2016. Melendez did not submerge his phone in water and even if he did it is waterproof. The state had his computer hard drive secured during the time he was out.

On cross-examination Alfonso states he was a principal investigator for two years and he has performed criminal investigations. In this matter he made his determination after consulting with Haley who was the director of legal and regulatory affairs. He did not make it on his own. He believes that an administrative violation was committed by conducting the searches but that

a crime was not. The Commissioner has the authority to change policy that everyone going in or out of the institution get searched. The facility is a maximum-security prison.

Alfonso did not meet with the Commissioner until January 6, 2016 and he did not speak to Melendez until the sixth. He believes that the FNDA lists disciplinary action accurately but there is a typo. The same typo exists in his email, but it is not intentional. A report is required when an investigation is opened, and it is not wrong to write a report. There was nothing wrong with Melendez's starting an investigation. Interviews occurred before the January 8 phone call. The eighth was a Friday. Alfonso sent email on Monday, January 11 when they were back in the office.

The case was closed on January 14. Alfonso does not know if Melendez was on premises between January 11 and January 14 but states that the investigation should have concluded on January 6. Alfonso told Melendez to shut the investigation on January 8. Alfonso knew the investigation and not yet closed on the eighth, but he did not discipline Melendez at that time. Melendez did not interview Assistant Commissioner Ricci and Alfonso does not know if the Commissioner did. Alfonso believes recorded conversations were not kept confidential and that that is a violation of the IMP. Email from state computer to home computers is also a violation (R–3) shows that information was sent from a personal to work cell phone and to others.

On redirect he states that all orders are final and that his directives are orders. Regarding the fact that thirty days passed before charges were issued, he noted that it was not till after January 27 that Alfonso realized that Melendez had continued to investigate, and he realized exactly how much he had continued after the confiscation of the machine.

The next witness called was principal investigator Edward Soltys (Soltys). Soltys is now assigned to the SID where he deals with staff misconduct. He discussed investigative procedures. He investigates all misconduct through all department facilities. He is familiar with the current matter and authored a report on it. (R–2.) He was assigned to this matter by the Chief. He reviewed the file and conducted a forensic search of Melendez's hard drive. He retrieved information from the hard drive and then reviewed his forensics report. (R–4.) He reviewed his report and said that it was a redacted file. He had to wait for the forensic report to determine if an unredacted copy existed. He asked for an email review for audio recordings and

noticed a redacted version of the file. He reached out to Melendez to interview him and found that he was on leave. He compiled what he could from what he had and forwarded the information on. He interviewed the chief who provided an email but Soltys never interviewed Melendez. He did reach out to interview him. He reviewed the refusal to be interviewed. (R-5.) The audio was provided to him for investigation as requested.

On cross-examination he acknowledged that he became aware of searches at the New Jersey state prison from speaking with Melendez. He believes that director Ricci's office directed administration at New Jersey state prison to conduct the searches of the vendors. Ricci is not chain of command at SID. She cannot order investigation, but she can refer to the chain of command. Soltys never made a fact finding himself as to the propriety of the searches. He acknowledges that an order must be lawful and acknowledged that an unlawful order need not be followed. He did not interview Ricci or the Commissioner. He did interview chief Alfonso but did not record the interview. It was just the two of them in a room. He does not make recordings - he conducts fact-finding. He does not recall if he saw the unredacted document before or after the interview. He does not recall if the recorded phone call was discussed in the interview. He reviewed multiple documents (R – 2, page 6, R–1) they all show January 5 date for an order.

Soltys did not investigate any cover-up and was not asked to. His investigation was timely to the events and was fact-finding. He confirmed a written order of January 11 with no prior written order issued. He did not record the audio that was reviewed - it was given to him and he listened. Soltys has known Melendez since 2002. He has worked with him on cases and found him to be professional. Soltys has never known him to be untruthful regarding investigations he conducted. Soltys reached for Melendez to interview him but Melendez was on leave. He does not know if it was medical - or rather did not know at the time. He is aware policy is to not contact individuals when they are on medical leave.

The next witness was James Naughton (Naughton). At the time of his testimony, he was a deputy chief investigator of SID. Before that he was a principal investigator first at Garden State and then at Southern State his current duties involve working out of central grounds in Trenton. Naughton knows Melendez. They went to the Academy together and worked together. He has never known Melendez to be untruthful and states he is a very good investigator. Naughton states that criminal investigations cannot just be stopped. "You can go and close that

case" is not a direct order. Principal investigators get leeway. He can't say if he would have continued as he does not know all the facts. He would expect a report from Melendez. Naughton did not think it was appropriate to close the matter as certain criminal matters are only handled by the SID. He does not believe that policy prevents sending email.

On cross-examination he states that he did not speak to the chief, the Commissioner or to staff - he only spoke to Melendez. He acknowledges that files are supposed be secure.

Melendez testified on his own behalf. He is a senior corrections officer and has been since March 2016. He salary is $83,000 per year. Prior to that he was a principal investigator for the special investigation division. He held that job for ten months and was a senior investigator for fourteen years prior to that. He is a sworn law enforcement officer, carries a firearm and can make arrests. As principal investigator he was transferred to New Jersey State prison in the summer of 2015. He served as senior investigator for the prior one and half years and as a senior corrections officer from 2004. In January 2016 he was a principal investigator overseeing staff investigative unit.

On January 5, 2016 he learned of a search of medical staff being conducted at the facility. He heard about it at 9:00 p.m. It occurred at 2:00 p.m. He had not been made aware that they were happening. Due to the expertise of SID, they usually are involved in any searches being conducted on the premises. He became aware that corrections officers were conducting the search - none of whom were from the SID. He received an email from shift command telling him that staff was being searched on the way out of the building without warrants. He called the administrator Stephen Johnson who was essentially the warden of the facility and who acknowledge that the search had occurred. Melendez asked why he wasn't included in the procedure of the searches and states that the administrator botched the question and said that he was told to conduct searches. He said about a dozen individuals were involved. Johnson told him that Michelle Ricci in command told him to conduct the searches. Melendez contacted his supervisor but received no response.

On January 6, 2016 Melendez heard from chief Alfonso. Melendez looked for reports but found none. He states that searches or use of force require a report when they are conducted. The chief told him that he was all in and agreed with him said that he had the same concerns.

After that Melendez was told to report to central office and was told to clear his stuff from SID and not to use the resources. He never regained his duties. He received a triple demotion to senior correction officer and is mostly assigned to the infirmary. He is not aware of any policy that prohibited his recording a phone call. New Jersey permits a party to a conversation to record the conversation. He did not believe that the order to close the search was lawful. He disputes the PNDA stating that he was ordered to close the case on January 5 because that did not happen. He did not speak with the chief that day. Investigations are never referred to the prosecutor by the Agency. He did refer on January 17 because he thought that strip searches were occurring. Alfonso never told him to stop until the 4:00 p.m. order issued during the recorded phone call.

He states again that he was told to close the case verbally on the eighth and by email on the eleventh. He did not take being told it was okay to close the case as an order.

At this time Melendez called Michelle Ricci to testify. She is the assistant Commissioner of operations for the NJDOC. She was appointed September 15, 2018. She is not a sworn law enforcement officer. Previously she was the director of operations for eight years. Ricci has no oversight or authority over the SID. At the time of the events relevant to this matter, specifically, on January 5, 2016 she had no right to issue search warrants for or arrests of the contract staff.

Ricci is familiar with the SID. She promulgated the order for the search of the contract medical staff on January 5, 2016. The request came from supervisor certified medical staff member Mary Lake (Lake), who contacted Ricci by telephone. Lake informed Ricci that she was performing a count of sharps and medications to verify the inventory and that the audit caught a mistake of dispensing. Ricci told Lake to run the matter up her chain of command. Lake informed her that she had. Ricci went to pass the request over to the assistant Commissioner but was told she was in a meeting. Ricci then went to see a Deputy Commissioner and was told that he was in a meeting as well.

Ricci called the Administrator of New Jersey State Prison and instructed him to conduct searches. It was her authority, and her belief was that the chain of command was aware of the request even though she did not speak to them directly. She was not specifically aware of strip

searches of employees for missing medicine. No one ever told her or showed her a search warrant she did not notify SID as they are not in her direct chain. She did have the ability to call them.

Ricci believes that what occurred was that an inmate had been given the wrong medication. She does not know if it happened more than once. At that time, she did not believe there was criminal liability forgiving the wrong medication. Today she believes there can be. She acknowledges that if there is potential criminal liability that SID should be notified and the SID determines whether to reach out to the prosecutor's office. To her knowledge SID was not notified about the searches. She believes that Chief Alfonso was the chief investigator.

Ricci did not learn the results of the search and she did not ask. Ricci believes no medication was found on any searched individuals. Administration would follow up with her if something was found. She had no solid information that medications were missing. She was told the next day at her morning briefing that no medications were found. By that time SID was then involved. Ricci was verbally counseled (disciplined) the following day by the Commissioner over this matter. He told her that no such searches should ever occur without him being made aware. He was yelling. He made it clear he was always to be notified. Ricci replied "yes, Sir!" There was no letter issued and nothing was placed in her file. No PAR report indicating the issue. She never heard about the matter again.

Ricci was made aware that Melendez was disciplined. She did not know why and did not discuss it with anyone. She is not aware of any other disciplines stemming from this matter. She does not recall who else conducted searches. Ricci never ordered that no reports were to be issued. She did not have the authority to do so. She agrees that reports should have been written. The Commissioner never said that he did not want the SID investigation to continue. Ricci never said that either.

Ricci was made aware that Melendez filed a complaint against her when she was called in the case. That was probably in 2018. She was not made aware when it occurred in 2016. She did not review any documents or complaints. She only believes that it was about the searches and she did not know she was named until recently.

Ricci says the searches were not ordered on a belief that illegal conduct had occurred, so she believed that the fourth amendment did not apply.

On cross-examination she described her work history. She had been a correction officer in Kansas. She came from Kansas to the NJDOC. She was a social worker at East Jersey State Prison and became an assistant administrator and assistant Commissioner. Searches are conducted all the time. Years ago, a gun was discovered at New Jersey state prison. She was administrator at the time, and she was involved in the search process.

On redirect Ricci stated the gun search was prior to the medical staff searches. She cannot remember the exact year but states that it was fewer than five years prior. She states that SID was involved, and law enforcement was involved. She does not remember any other time that staff searches were ordered. She cannot recall any other time that medical staff were searched on the way out of the building. She does not believe that it is improper for SID to investigate circumstances of a search if they feel it is wrong, but they should do so through the chain of command. On recross she clarified that the gun search occurred while she was the assistant administrator. In 2011 she was director of operations.

Based on the testimony and documentary evidence offered and, in the record, I make the following **FINDINGS** of **FACT**:

On January 5, 2016 Michelle Ricci, who was then serving as the director of operations for the NJDOC, was notified by an individual outside of her chain of command of an issue in the inventory at the New Jersey State prison involving sharps and medicine. She attempted to bring the matter to the attention of her supervisors in the chain of command, the assistant Commissioner and the Commissioner, but was unable to reach either. She made the decision to order the searches of contract medical staff leaving the premises at the end of their shift. She communicated the direction to the administrator of the facility and the searches were conducted. She was later disciplined for that decision by the Commissioner. No criminal charges were brought regarding the searches.

At some point on that day Melendez became aware of the searches being conducted. He was a principal investigator with the SID. He undertook to begin

investigation into the matter to determine what was happening. He attempted to reach for the chief of the SID Manuel Alfonso. They spoke on January 6. They spoke again on January 8 and Melendez recorded that phone call. The chief told Melendez to end the investigation. Melendez was uncomfortable with the direction. The chief offered to send him the directive in writing. On Monday, January 11 he did so. On Thursday, January 14 Melendez closed the investigation.

On January 27 Melendez sent an email to the chief. Melendez had heard that the assistant Commissioner was looking to collect all reports that had been completed in the aftermath of the January 5 searches of the contract medical staff at New Jersey state prison. Melendez asked the chief if he wanted a copy of his report.

The chief was concerned that Melendez had continued to work on the investigation after he had ordered it closed. He asked that the matter be investigated, and Edward Soltys completed that investigation. Based on the results and findings of the investigation the chief ordered that charges be brought against Melendez of insubordination, conduct unbecoming and other sufficient cause for failing to close the investigation, for continuing to conduct the investigation, and for failing to safeguard information.

In addition to these facts which have been found, in the present matter it further needs to be determined whether the chief ordered Melendez to close investigation; Whether Melendez did in fact close the investigation; Whether Melendez continued to work on the investigation after being ordered to close it but before closing it; and, whether he failed to safeguard information gathered in that investigation.

The witnesses agree that the Chief told Melendez to close the investigation on January 8 verbally and on January 11 in writing and I so **FIND**. There is no dispute that Melendez closed the matter on January 14 and completed a report, and I so **FIND**. The witness testimony is consistent that when investigation is open a report should be written. It is not clear at the outset whether the chief had told Melendez to close investigation earlier and whether that direction constituted an order.

The specifications allege that the Chief ordered Melendez to cease investigating the matter on January 5, 2016. Melendez indicates that they did not speak on that date.

Credibility is best described as that quality of testimony or evidence which makes it worthy of belief. The Supreme Court of New Jersey considered the issue of credibility in In Re Estate of Perrone, 5 N.J. 514 (1950). The Court pronounced:

> Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.
>
> [Ibid. at 522]

See also Spagnuolo v. Bonnet, 16 N.J. 546, (1954), State v. Taylor, 38 N.J. Super. 6 (App. Div.1955).

In order to assess credibility, the witness' interest in the outcome, motive or bias should be considered. Furthermore, a trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura- Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

The specifications attached to the FNDA (R-1) allege that the Chief ordered Melendez to cease the investigation of the January 5 searches on January 5, 2016. This allegation stems from Soltys's report (R-2) which included an email he received from the chief when the matter was referred to him. That email also included the allegation by the Chief that he had given the order on the fifth. Melendez testified that he was unable to reach the Chief on the fifth but spoke with him on the sixth. This is supported by the underlying documents referred to by Soltys and included in his report. (R-2.)

During his testimony Chief Alfonso stated on direct that he first spoke with Melendez on the matter a day or two after the searches occurred. He readily acknowledged during cross-examination that identifying January 5, 2016 as the date that he ordered Melendez to cease the investigation was an error, calling it a typo.

Accordingly, I **FIND** that the first time the Chief and Melendez spoke on this matter was January 6, 2016. To the extent that Melendez asserts that repeated references to January 5 as the date of the order represent a doubling down on a falsity, this argument falls flat. It is clear from the record and I **FIND** that the January 5 date originated in the Chief's email to Soltys on January 27, and the misstatement was carried forward by Soltys in reliance on that email in his report (R-2) and again into the charging documents (R-1).

The Chief and Melendez generally agree on the substance of the January 6, conversation, and I **FIND** that on that date the Chief, having spoken to the Commissioner on the matter, told Melendez that SID could close the investigation if one had been opened. I further **FIND** that after that conversation Melendez did proceed to work on the investigation, interviewing several individuals. The interviews were concluded before the recorded phone conversation of January 8, 2016 between the Chief and Melendez. The record does not support a finding of any further investigative activity performed by Melendez after the conversation on January 8 other than closing the case on January 14 and completing a report based upon what was gleaned prior to the January 8 phone call.

It will be determined in the section addressing conclusions of law which if any of the conversations between the two constituted an order. However, considering Melendez's use of the phrase "I determined the investigation would continue", his explanation that he was concerned with protecting himself in the event that the chief retired, his decision to record his conversation with the Chief without notifying him on January 8, 2016, and his own description during his testimony of the intensity of his reaction after speaking with the chief on January 6, 2016, I **FIND** that Melendez believed he had been told to stop the investigation, even if those exact words had not been used. His stated pretext as to the reason he decided to record the call and his attempts to distinguish between the Commissioner telling SID not to investigate rather than the chief telling him not to investigate are not supported by the contemporaneous documents and do not alter the picture painted by his action. Finally, I **FIND** that to the extent that the appointing authority's own witnesses seemed to equivocate during their testimony as to whether Melendez failed to follow procedure in handling confidential information, there is insufficient evidence in the record to determine by a preponderance that he did so.

CONCLUSIONS OF LAW

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

In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:-2.21; N.J.A.C. 4A:2-1.4(a). The authority must show by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

In the present matter, respondent has charged Melendez with violations of N.J.A.C. 4A:2-2.3(2) (Insubordination), N.J.A.C. 4A:2-2.3(6) (Conduct Unbecoming a Public Employee), and N.J.A.C. 4A:2-2.3(12) (Other Sufficient Cause), specifically, Human Resource Bulletin 84-17 C(9), insubordination, C(11), Conduct Unbecoming an Employee, and E(1) Violation of a rule, regulation, policy, procedure , order or administrative decision, for failing to follow an order to close an investigation and for failing to follow procedure in handling confidential information.

Melendez was charged with a violation of N.J.A.C. 4A:2-2.3(a)2 - insubordination. Black's Law Dictionary 802 (7th Ed. 1999) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation.

> "Insubordination" is not defined in the agreement. Consequently, assuming for purposes of argument that its presence is implicit, we are obliged to accept its ordinary definition since it is not a technical term or word of art and there are no circumstances indicating that a different meaning was intended.
>
> [Ricci v. Corporate Express of the East, Inc., 344 N.J. Super. 39, 45 (App. Div. 2001) (citation omitted).]

Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. Insubordination is always a serious matter, especially in a paramilitary context. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

In the present matter, the record reflects that Melendez was told by his supervisor on January 6, 2016 that the commissioner had told that supervisor that no investigation was necessary, and that SID could close an investigation if one was opened. Considering the totality of the circumstances along with Alfonso's credible testimony describing how in a paramilitary organization most orders are given verbally and not in writing, I **CONCLUDE** that Melendez was ordered to close any such investigation on January 6, 2016. Melendez's assertion that Alfonso used imprecise language or was otherwise unclear is unpersuasive and belied by Melendez's own behavior afterword. He clearly believed he had been ordered to close the investigation and was not happy about it. The record further reflects that he continued to conduct the investigation after being given the order on January 6, 2016.

To the extent that Melendez suggests that any order given before the written email was an illegal order that he was not required to follow is equally unpersuasive. Melendez appears to conflate the order to conduct the searches, which was not disputed to be an improper order, and which he was not the recipient of, with the order that he was given to close the investigation, which was properly sent down the chain of command. He argues at great length that there was some sort of cover up designed to hide the truth of what happened. But as is clearly demonstrated in the record, there was no cover up; no great mystery to be solved. An individual outside his chain of command and higher than him on the organizational chart made a poor decision in a moment when she was unable to reach her supervisors for guidance and issued an improper order. Her supervisor, the Commissioner, knew about it almost immediately and addressed it. He also knew about it when he told Alfonso that no investigation was necessary. The individual who gave the order was disciplined, and that individual, then-director of operations Ricci, testified in this matter as to her role and as to what and when the Commissioner knew about it. As demonstrated in the testimony of Alfonso and Melendez, and in their recorded phone conversation, Melendez was more concerned that Alfonso would retire, and a specific individual would replace him who would use this matter against Melendez.

There was no cover up, only pretext. The supervisor of the individual who gave the improper order, who is also the Commissioner, had the information he needed to understand and address what happened, as so necessarily did the NJDOC. The person responsible owned up to it to her supervisor, who is also the senior official in the NJDOC. Although SID and its principal investigators are given broad discretion in determining what investigations to conduct, such discretion is not absolute, and Melendez was appropriately ordered to stand down through his chain of command regarding a matter outside his chain of command. Those who needed to know had the information required to resolve the issue. There is no requirement that Melendez be personally satisfied before accepting a proper order. I **CONCLUDE** that the allegation of violation of N.J.A.C. 4A:2-2.3(a)2 – insubordination – has been proven by a preponderance of evidence and must be **SUSTAINED**.

Melendez was charged with "[c]onduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which

encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that tends to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "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)). Suspension or removal may be justified where the misconduct occurred while the employee was off duty. Emmons, 63 N.J. Super. at 140.

In the present matter, in considering the conduct reflected in the record and the attending circumstances, I **CONCLUDE** that the appointing authority has sufficiently demonstrated that Melendez engaged in conduct unbecoming. Continuing to conduct an unnecessary investigation, after being ordered to stop, burdens the resources of the appointing authority and the SID in such a manner so as to affect the efficiency of the unit. The charge of violating N.J.A.C. 4A:2-2.3(a)(6) is **SUSTAINED**.

Melendez has also been charged with a violation of N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause). Specifically, Melendez is charged with violations of Human Resource Bulletin 84-17 C(9), insubordination, C(11), Conduct Unbecoming an Employee, and E(1) Violation of a rule, regulation, policy, procedure , order or administrative decision, for failing to follow an order to close an investigation and for failing to follow procedure in handling confidential information.

In the present matter, to the extent that violations of Human Resource Bulletin 84-17 C(9) and C(11) require a determination as to whether Melendez was guilty of insubordination and/or conduct unbecoming, such allegations have been addressed and sustained within the discussion of violations of N.J.A.C. 4A:2-2.3(a)(2) and (6). With regard to E(1) Violation of a rule, regulation, policy, procedure , order or administrative

decision, although there is insufficient evidence in the record, and to the extent that the appointing authority's own witnesses seemed to equivocate during their testimony as to whether Melendez failed to follow procedure in handling confidential information, the record is clear that he did violate an order and administrative decision when he did not close the investigation after being ordered to do so. I **CONCLUDE** that the allegation of a violation of Human Resource Bulletin 84-17 E(1) and, consequently, N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause) must be **SUSTAINED**.

PENALTY

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

The concept of progressive discipline may "support the imposition of a more severe penalty for a public employee who engages in habitual misconduct" or "mitigate the penalty for a current offense . . . for an employee who has a substantial record of employment that is largely or totally unblemished by significant disciplinary infractions." Hermann, 192 N.J. at 30-33. However, progressive discipline may be bypassed "when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest." Id. at 33.

The Civil Service Commission's review of penalty is de novo. N.J.S.A. 11A:2-19 and N.J.A.C. 4A:2-2.9(d) specifically grant the Commission authority to increase or decrease the penalty imposed by the appointing authority.

General principles of progressive discipline apply. Town of W. New York v. Bock, 38 N.J. 500, 523 (1962). Typically, the Board considers numerous factors, including the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463.

"Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, 38 N.J. 500, 523 (1962), that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990).

Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

Some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007), citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197–98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense); see also In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who snapped lighter in front of five-year-old):

> . . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

The Commission has authority to increase the penalty beyond that established by the appointing authority's Final Notice of Disciplinary Action, but not to removal from suspension. N.J.S.A. 11A:2-19. The Civil Service Commission may increase or decrease

the penalty imposed by the appointing authority, but removal shall not be substituted for a lesser penalty. See Sabia v. City of Elizabeth, 132 N.J. Super. 6, 15–16 (App. Div. 1974), certif. denied, Elizabeth v. Sabia, 67 N.J. 97 (1975).

Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

> The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We can take judicial notice that such facilities, if not properly operated, have a capacity to become "tinderboxes."
>
> [Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).]

In the present matter, despite Melendez's otherwise unremarkable disciplinary history, the question becomes whether progressive discipline should be bypassed such that Melendez should be subject to the two-level demotion sought by the appointing authority because his misconduct renders him unsuitable for continuation in the sensitive position of SID. While each disciplinary matter must be decided on its own merits, other cases involving demotions of corrections supervisors for disciplinary reasons are instructive in determining the appropriate discipline for Melendez's misconduct.

In re Delgado, 2010 N.J. Super. Unpub. LEXIS 2936 (App.Div. December 9, 2010), an appellate panel upheld the demotion of a county corrections lieutenant to sergeant for repeated sexual harassment of a female subordinate despite an absence of major discipline on his record. According to the court, "[c]ertainly the Commission had discretion to impose a lesser penalty such as a period of suspension," but the appellant in that matter "also could have received a more severe, two-step demotion, or even been terminated." Id. at *14. Instead, the Commission bypassed progressive discipline by

ordering a one-level demotion, which the court concluded was not "unwarranted" given the seriousness of that appellant's misconduct. Ibid.

In In re Wilson, 2019 N.J. Super. Unpub. LEXIS 323 (App.Div. February 8, 2019), the court affirmed the demotion of a corrections sergeant to corrections officer for falsely reporting that subordinate officers had completed a security check and then lying about it. In that case, the appellant's disciplinary record included several similar offenses over the course of seventeen years. The court concluded that "the evidence supports the Commission's finding that [appellant's] conduct demonstrated that she was unsuitable to continue in her role as a supervisor and her continuation in a supervisory position was inimical to the safety and security of the inmates and staff," and that "[g]iven the circumstances present, and [appellant's] prior disciplinary history, the demotion does not shock our sense of fairness." Id. at *7 (internal citation and quotation omitted).

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

Here, like in those cases, Melendez's misconduct warrants the circumvention of progressive discipline. Melendez's conduct demonstrated that he is unsuitable to continue in his role as a principal investigator for SID and that his continuation in that position is inconsistent with what is required of that role. Given the nature of the conduct, the sensitive nature of the job role, and Melendez's failure to acknowledge his misconduct or demonstrate understanding of those issues, I **CONCLUDE** that the appropriate penalty for Melendez's misconduct is the demotion from principal investigator to senior corrections officer, his last civil service title, and a thirty-day suspension. The penalties sought by the appointing authority are **SUSTAINED**.

Like in Delgado, the appointing authority could have sought a lesser penalty such as a suspension, but also could have sought a harsher penalty such as termination for Melendez's misconduct. However, NJDOC instead concluded that the appropriate penalty was to strip Melendez of his role as a principal investigator for SID as his conduct demonstrated a lack of ability to appreciate the appropriate exercise of discretion in handling the sensitive matters that present to the SID, and instead chose to pursue personal protection and agenda ahead of following the appropriate course of action and obeying an appropriate order. After a de novo hearing, I agree with that decision. The record reflects that a good amount of discretion is placed into the hands of a principal investigator for SID. It is imperative that such discretion is exercised appropriately for the circumstances each time it is used. The record reflects that Melendez failed to do so and failed to recognize that.

ORDER

Based on the foregoing, I hereby **ORDER** that the appointing authority's suspension and demotion of Melendez be **SUSTAINED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 11, 2021
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: May 11, 2021 (emailed)

Date Mailed to Parties: May 11, 2021 (emailed)

EAP/mel

APPENDIX

WITNESSES

For Petitioner:

Manuel Alfonso
Edward Soltys

For Respondent:

James Naughton
Robert Melendez
Michelle Ricci

EXHIBITS

For Petitioner:

P-1 through P-6 Not admitted into Evidence
P-9 Email dated January 11, 2016

For Respondent:

R-1 PNDA/ FNDA
R-2 Confidential SID Investigation by Edward Soltys with attachment, Case No 2016-02-09-006 SIDIA (36 pages)
R-3 Confidential SID Investigation by Jeffrey Polling with DVD, Case No. 2016-01-28-001-TSU (3 pages)
R-4 Confidential SID Investigation by Eugene Johnson, Case No. 2016-02-09-006-SIDIA (61 pages)

R-5 Email Exchange between Robert Melendez and Edward Soltys date February 8, 2016

R-6 IMP #35 Investigation Procedures (5 pages)

R-7 IMP #000 chain of command, Special Investigations Division (3 pages)

R-8 Law Enforcement Rules and Regulations (22 pages)

R-9 Handbook of Information and Rules (17 pages)

R-10 SWSP Checklist for New Hires, dated December 16, 1997 (1 page)

R-11 HRB 84-17, as amended