STATE OF NEW JERSEY

In the Matter of Brian Ambroise	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket No. 2021-1014 OAL Docket No. CSR 02637-21	

ISSUED: SEPTEMBER 9, 2021 (NFA)

The appeal of Brian Ambroise, a Senior Correctional Police Officer with the Edna Mahan Correctional Facility, Department of Corrections, of his removal, effective December 4, 2020, on charges, was before Administrative Law Judge Sarah G. Crowley (ALJ), who rendered her initial decision on July 26, 2021. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the attached ALJ's initial decision and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on September 1, 2021, did not adopt the ALJ's recommendation to modify the removal to a 20 working day suspension. Rather, the Commission modified the removal to a six-month suspension.

DISCUSSION

The appellant was served with a Final Notice of Disciplinary Action removing him from employment, effective December 4, 2020, on charges of conduct unbecoming a public employee, other sufficient cause and violation of departmental rules and regulations. Specifically, the appointing authority asserted that the appellant had improper sexual contact with an inmate, failed to report such contact and was unduly familiar with an inmate by providing contraband to an inmate and passing notes between inmates. Upon the appellant's appeal to the Commission, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In her initial decision, the ALJ recommended dismissing the charges associated with the sexual contact and the undue familiarity. However, she recommended upholding the charge that the appellant failed to report that the inmate kissed him. Regarding the alleged sexual contact, the ALJ found the appellant's testimony credible as compared to the inmate alleging the contact, and rejected the appellant's alleged confession given to the prosecutor as, in essence, coerced. The ALJ also considered the DNA evidence and corresponding testimony presented and ultimately found that it was unreliable as there was no testimony regarding the chain of custody, mode of collection, time of collection or where it was stored. Regarding the undue familiarity charge, the ALJ indicated that there was no credible evidence that the appellant brought contraband to the facility and, while the appellant admitted to relaying a verbal message between inmates on one occasion, "[i]t was not a message that would jeopardize the safety and security of the facility, nor does it seem to imply or demonstrate undue familiarity." Based on her finding that the appellant should have reported the inmate's kiss, the ALJ recommended that the appellant receive a 20 working day suspension.

In its exceptions, the appointing authority argues that the ALJ erred in discounting the appellant's confession regarding the sexual contact made during his interview with the prosecutor during the criminal investigation into the matter. It contends that the interviewers used permissible tactics in the interview and the appellant admitted that he had inappropriate sexual contact with the inmate. Additionally, it contends that the appellant signed an order regarding the criminal matter attesting to the fact that the confession was knowing and voluntary. It states that such evidence, which it just uncovered, should be at least sufficient to remand the matter for additional proceedings. It also argues that the ALJ erred in finding that the appellant had the right to a union representative at the interview. Additionally, it states that the ALJ should not have discounted the DNA evidence presented in that regard. Moreover, it contends that the ALJ erred in dismissing the charges underlying the appellant's failure to report the incident as the testimony demonstrated that even if the inmate's kiss was unsolicited, such an incident was required to be reported under its policies. It further argues that the ALJ's dismissal of the undue familiarity charge was in error as even the appellant's admitted conduct in verbally passing a message between inmates was a violation of its policies. Finally, it contends that based on the nature and egregiousness of the misconduct, that removal from employment is the proper penalty.

In response, the appellant argues that there is no reason to remand or reopen the matters as the appellant's signed statement in the criminal matter is not persuasive. In that regard, he states that the statement and confession was presented to the jury in that matter, which ultimately found him not guilty of the alleged sexual contact. Further, he argues that the ALJ's credibility determinations regarding the confession were proper and should not be disturbed.

Upon its *de novo* review of the record, the Commission agrees with the ALJ regarding the charges underlying the alleged sexual contact. In this regard, 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 also, 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 sufficient 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). While the appointing authority makes several arguments regarding the ALJ's credibility determinations concerning her exclusion of the appellant's confession as well as her discounting of the DNA evidence, the Commission finds that her finding the appellant's testimony credible was not arbritrary, capricious or unreasonable. In this regard, the appointing authority did not provide testimony from the inmate to corroborate her allegations, nor did it establish that the appellant's testimony did not hang together. Further, it was not unreasonable for the ALJ to credit the appellant's consistent testimony from his criminal interview prior to the use of what can only be described as heavy-handed, and arguably inappropriate, tactics by the interviewers. While the DNA evidence, if it had been more reliable, may have borne on the appellant's credibility, the Commission cannot find that the ALJ's lending that evidence little weight was in error. As indicated by the ALJ, without testimony or evidence regarding the chain of custody, mode of collection, time of collection or where it was stored, such evidence is questionable, at best. Moreover, the Commission rejects the appointing authority's request for a remand based on the appellant's signed statement in the court matter that the confession was knowing and voluntary. The Commission finds that the statement is not persuasive in demonstrating that the ALJ's credibility determinations regarding the testimony about the confession was in error. The Commission takes notice that the statement was signed by the appellant. However, that statement does not overcome the credible testimony that the confession was extracted in such a matter from the appellant as to make its accuracy seriously in question.[1] As such, the Commission upholds the ALJ's recommendation to dismiss those charges.

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[1] The Commission also notes that the appellant was found not guilty of the associated serious criminal charges. While the standard or proof in that matter was different from the present matter, it cannot be ignored that the jury in that matter must have determined that there was at least reasonable doubt that the appellant's confession was not reliable evidence of his guilt. In the present matter, an independent authority, the ALJ, as well as the Commission is similarly finding that there is not a preponderance of the evidence to support that the confession reliably demonstrated that the

Further, the Commission agrees with the ALJ's finding that the appellant violated policy by not reporting the inmate's kiss. The Commission notes that while finding this to be the case, the ALJ found this activity to not be so "unusual" but nevertheless found that the appellant should have reported it. To the contrary, the Commission cannot fathom how any custodial staff in a correctional facility for women could reasonably interpret an unwanted kiss from an inmate as anything but an unusual incident that needed to be reported. In this regard, the Commission is highly dubious of the appellant's indication that he did not report the kiss because he did not deem it necessary.

However, the Commission disagrees with the ALJ regarding the charge of undue familiarity regarding the verbal passage of a message between two inmates. While the Commission agrees that there is no competent evidence regarding the contraband allegations, the appellant's own admission that he orally passed a message between inmates establishes that he was unduly familiar. Clearly, regardless of the content or context of the message passed, the fact that the appellant, a Senior Correctional Police Officer admittedly facilitated the transfer is highly inappropriate. In this regard, the Commission cannot imagine any circumstance where the relaying of a personal message between inmates by a Senior Correctional Police Officer would be appropriate. Contrary to the ALJ's finding, any such occurrence could potentially affect the safety and security of the facility. For example, once the message was passed, at least two inmates knew that the appellant was willing to violate policy on their behalf. Surely, should such information be passed to other inmates, the appellant's authority, as well as the potential safety and security of the facility, would thereafter be compromised. As such, the Commission finds that the appellant's passage of the message establishes that he was unduly familiar.

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).

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appellant engaged in the sexual activity. Therefore, it does not overcome the credibility findings made by the ALJ and adopted by the Commission.

In this case, the appellant's actions are clearly serious and highly concerning, especially in a correctional setting. In this regard, even when a Senior Correctional Police Officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense occurring in the environment of a correctional facility may, nevertheless warrant the penalty of removal where it compromises the safety and security of the institution, or has the potential to subvert prison order and discipline. *See Henry, supra,* 81 *N.J.* at 579-80. In this regard, the Commission emphasizes that a Senior Correctional Police Officer is a law enforcement officer who, by the very nature of his job duties, is held to a higher standard of conduct than other public employees. *See Moorestown v. Armstrong,* 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied,* 47 *N.J.* 80 (1966). *See also, In re Phillips,* 117 *N.J.* 567 (1990). While the appellant has been found guilty of infractions that touch at the heart of the safety and security of correctional facilities, the Commission finds that the circumstances warrant a penalty less than removal. With that said, the Commission is in no way minimizing the appellant's highly improper conduct. Certainly, his actions in passing a message between inmates is highly inappropriate and puts into question the appellant's judgment to effectively perform the duties required of the position. Further, the appellant's failure to report contact with an inmate of a sexual nature, even where it was not initiated by him or welcomed, is puzzling at best. Nevertheless, given the way this entire matter proceeded and acknowledging that the most serious misconduct was not proven, the Commission cannot find that the appellant should be removed without a second opportunity to demonstrate his competence. Accordingly, the Commission finds that a six-month suspension is the proper penalty. The Commission notes that the six-month suspension is the most severe sanction, absent removal, that can be imposed. This penalty should serve as a warning to the appellant that any future infractions could lead to a more severe disciplinary sanction, including removal from employment.

Since the penalty has been modified, the appellant is entitled to back pay, benefits and seniority six months from the first date of his separation to the actual date of his reinstatement. *See N.J.A.C.* 4A:2-2.10. 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 has sustained charges and imposed major discipline. 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. In light of the Appellate Division's decision in *Dolores Phillips v. Department of Corrections,* Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. However, under no circumstances should the appellant's reinstatement be delayed pending any dispute as to the amount of back pay.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore modifies the removal to a six-month suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority as specified above. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned, and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending any dispute as to the amount of back pay.

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

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

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 1ST DAY OF SEPTEMBER, 2021

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 02637-21
AGENCY DKT. NO. n/a

IN THE MATTER OF BRIAN AMBROISE,
EDNA MAHAN CORRECTIONAL FACILITY.

James R. Wronko, Esq., for appellant Brian Ambroise (Wronko Loewen Benuccci, Attorneys at Law, attorneys)

Rimma Razhba, Deputy Attorney General, for respondent Edna Mahan Correctional Facility (Andrew J. Bruck, Acting Attorney General of New Jersey, attorney)

Record Closed: July 9, 2021 Decided: July 26, 2021

BEFORE **SARAH G. CROWLEY,** ALJ:

STATEMENT OF THE CASE

Appellant, Brian Ambroise, appeals from the determination of the respondent, the Edna Mahan Correctional Facility for Women (EMCF), to remove him from his position as a senior correction officer (SCO) due to conduct unbecoming, general causes, improper and unauthorized contact with inmate, undue familiarity with inmate, and other sufficient cause. The appellant is charged with violations of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause. He is also charged with violations of Human Resources Bulletin (HRB) 84-17, as amended, D. safety and security

precautions, 4. improper or unauthorized contact with inmate—undue familiarity with inmates, parolees, their families or friends.

PROCEDURAL HISTORY

A Preliminary Notice of Disciplinary Action (PNDA) was filed against appellant by the respondent on October 7, 2016. After not-guilty verdicts on related criminal charges against the appellant, a Final Notice of Disciplinary Action (FNDA) removing the appellant from his position was served on December 4, 2020. The appellant filed an appeal, and the matter was transmitted to the Office of Administrative Law (OAL), where it was filed as a contested case on March 10, 2021. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A Zoom hearing was conducted on June 23, 2021, and June 24, 2021.[1] The record was closed after post hearing submissions were filed by the parties on July 9, 2021.[2]

FACTUAL DISCUSSION AND FINDINGS

Testimony for Respondent

Altario Washington is employed at the EMCF as a lieutenant. He is responsible for policy development, implementation, and records retention for the facility. He has been at the Department of Corrections (DOC) for close to twenty years, and in his current position for a year and a half. There are 371 inmates at the EMCF. He described the facility and the different housing units. He identified the policies and procedures governing staff at the EMCF. He identified the internal management policy of the facility regarding sexual assault. He also

[1] The respondent sought an interlocutory appeal to the Civil Service Commission(CSC) of the undersigned's denial of a request for a sixty-day adjournment a few days before the hearing was to commence. The purported reason was to obtain copies of the criminal transcript, which were obtained. The undersigned's denial was predicated on the CSC rule regarding expedited consideration of removal cases and the 180-day rule. The CSC granted a two-week adjournment. Notwithstanding receipt of same, no transcripts were used in the hearing.

[2] The parties were given two weeks to provide written closing summations. The respondent sought an extension of time to file closing submissions which was denied due to the aforementioned 180-day rule. The interlocutory appeal of the that decision was denied by the CSC as untimely.

identified and discussed some the provisions that related to undue familiarity with inmates. He testified that relationships, favorable treatment, and extra privileges are prohibited.

Lieutenant Washington identified the policy requiring the reporting of any "unusual conduct." He testified that anything that would jeopardize the safety and security of the institution would be prohibited, but that it was permissible to talk to the inmates. He testified that in his opinion delivering a message from one inmate to another would violate the policy, even if it was not a safety or security issue. The witness also identified the policy that required reporting any unusual conduct. Again, there is no definition of "unusual conduct," nor did the witness give examples or refer to any policy that defines what needs to be reported. However, any sort of personal relationship with an inmate would be a violation. He also believed that passing of a message to another inmate, even verbally, would violate this rule. He also testified that the inmate trying to kiss him in the closet and asking him to bring her contraband should have been reported as unusual conduct.

Aaron Lacey is employed at the Hunterdon County Prosecutor's Office and has been there for sixteen years. Prior to working there, he was a patrol officer for the City of Lambertville and a detective there. This is his twenty-fifth year in law enforcement. He was assigned to the Special Victims Unit and received a call to interview a suspect about an assault at the EMCF on October 6, 2016. He interviewed Brian Ambroise in one of the interview rooms in the Special Investigations Division (SID) at EMCF. Lieutenant Larson from the Hunterdon County Prosecutor's Office was also present. There were four individuals in the room when SCO Ambroise was interviewed. He testified that it was a little unusual to have four people in an interrogation room, as they usually just work in pairs. Individuals from the SID were present and asked questions as well during the October 6, 2016, interrogation. He testified that SID "often does their own investigation."

He offered no reason why the normal protocol was not followed in this case. He identified the video, which was marked as R-15 into evidence. He identified Crystal Watson from his office, who was next to him during the initial interrogation, as well as the two individuals from SID. He is not familiar with "Weingarten rights," but he did get SCO Ambroise to sign a Miranda waiver before the interview began. There was no union representative present. Parts of the video were played, and during the petitioner's testimony it was played in its entirety. The video

speaks for itself. Mr. Lacey's testimony was a rendition of what was played in the video. He had no other evidence or first-hand knowledge of the events which form the basis for the criminal or disciplinary matter. For the reasons set forth in the Legal Analysis and Conclusion below, I am giving no weight to the videotaped interrogation.

Kathryn Meakim is employed by the New Jersey State Police. The DAG described her as a DNA expert but declined to qualify her as such, and proffered that she was testifying as a fact witness only. She was not involved in the collection of any of the DNA evidence in this matter. She testified that there were two different sets of Q-tips® cotton swabs provided to her office.[3] Two of them did not have the presence of any DNA, but the other two did. However, there was no controlled collection of the specimens and, apparently, they had been misplaced by the inmate for a period of time. She also testified that a water bottle, cigarette, or just about anything could be swabbed and produce the same result. There was no source of the collection identified, or any testimony about chain of custody of the specimens that she tested. A DNA report was identified and was entered into evidence. However, there was no evidence or witnesses to testify as to the chain of custody of the DNA evidence, or its mode of collection, or when each sample was collected or where it had been stored.

Jerome Scott is currently employed at the Eagle Mountain School District in Fort Worth, Texas. He was employed by the DOC prior to that and retired on March 31, 2021. He was a principal investigator for the SID and was involved with the investigation that led to the removal of SCO Ambroise in 2016. He testified to his experience and background as an SID investigator. On October 2, 2016, Scott received information from a confidential informant, J.O., who alleged that the petitioner was in a relationship with her. She called him on his cell phone. He testified that she is a regular informant against other inmates and officers and has been incarcerated for over ten years at the facility. She told him that the appellant had a relationship with her and that they had kissed on several occasions, and that he "went down on her." She also told him that he had brought her contraband and delivered messages for her to her friend on another unit. The video of the inmate was played in its entirety. She did not testify, nor was her sworn testimony from the

[3] Officer Kubik, who took possession of the Q-tips® cotton swabs from J.O., did not testify at the hearing.

criminal trial offered. The undersigned found that the hearsay statements from J.O. during her video interview were inconsistent, unreliable, and uncorroborated. They have been giving no weight due to the lack of any evidentiary value and any corroboration of her hearsay statements.

There were no other witnesses offered by the respondent. The respondent claimed that J.O. advised that others were aware of her alleged relationship with appellant, yet the State produced no one to corroborate her story. No one found contraband and no one questioned the other inmates to corroborate the claims. The alleged incident occurred in a busy section of the jail right before a head count, yet the respondent produced no witnesses who saw anything unusual. J.O. was not called as a witness. The officer who collected the Q-tips® cotton swabs was not called as a witness, and no expert on the issue of collection, testing or results of the DNA was called.

Testimony for Appellant

Brian Ambroise, senior correction officer at EMCF, testified on his own behalf. He had been employed at the facility for approximately three years prior to the incident in question. He has never been disciplined prior to this matter. When he was called down to SID on October 6, 2016, he thought it was for random drug testing, which happens all the time. When he saw that they wanted to ask him questions in an interrogation room, he asked Jerome Scott if he could have a union representative present. Mr. Scott told him he was not permitted to have a union representative present.[4] He had no idea what he was going in to be questioned about.

He testified that the week before he went on vacation, he was working the morning shift on September 26, 2016. He was in the closet getting supplies in the morning right before the end of his shift, and when he got up from reaching something on the shelf, inmate J.O. was in his face and kissed him. It was a quick peck. He ordered her to stand back and get out of the closet, and nothing else happened. It is a busy area, and it was at a busy time. If anything had happened, there were many people there that would have seen. Nothing happened. He

[4] Mr. Scott was recalled by the respondent on this issue, and he acknowledged that he advised the appellant that he was not entitled to have a union representative present. It was his belief that if it were a criminal interrogation the employee had no right to a union representative.

testified that he spoke to the inmates, and he felt it was part of his job to have a certain rapport with them, but he there was nothing more than that. He never shared any personal information with J.O. or anyone else. However, the guards talk to one another, and they talk about their families. It was no secret that appellant had a new baby girl and a little boy. He conceded that he gave a message to a friend of J.O.'s on another unit once, and he really did not think there was anything wrong with that. It was not a paper note or anything, J.O. had just asked him to tell the friend that she was mad at her and loved her. He did not report the incident in the closet because it was a split second, and he did not really think about it. Usually when you report something it is significant—he did not consider the incident in the closet to be significant.

On the issue of the contraband, he testified that he did not think it was necessary to report every comment from an inmate; they asked for things they were not allowed to have all the time, but he never brought any contraband into the facility for J.O. or anyone else. He testified that he did not have a relationship with J.O. and nothing inappropriate ever happened with her except that quick kiss in the storage closet which he really did not think much of. However, after an hour and a half of the interrogation and after telling them the truth over and over again, he thought that he had no choice but to tell them what they wanted to hear. They were telling him that they knew what happened, and they believed J.O. and not him. They told him if he confessed he might be able to see his children again and would get a lighter sentence. He testified that he was freaking out and did not know what else to do and wanted to get out of there. Other than the split-second peck in the supply closet, nothing inappropriate ever happened with J.O. Everyone knew she was the jailhouse snitch, so why would anyone ever do anything inappropriate with her?

FINDINGS OF FACT

The resolution of the claims in this matter requires that I make a credibility determination regarding the critical facts. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of fact. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also must be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See

Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story considering its rationality, internal consistency, and the way it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718,749 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone, or in connection with other circumstances in evidence, excite suspicion as to its truth. In re Perrone, 5 N.J. 514. 521–22 (1950); see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses, I **FIND** that the video interview of J.O. was not credible, nor were any of the hearsay statements in her video interview corroborated. She was not called as a witness, her sworn testimony from the criminal trial was not offered, and no explanation as to why she did not testify was provided. No other witnesses were called to corroborate her statements. I have given her video statement no consideration. I further **FIND** that the video interrogation of the appellant should likewise be given no weight due to the interrogation techniques that were utilized, which are discussed below, as well as the failure to allow any union representative during the interrogation, which included questioning by the SID regarding alleged Civil Service and Department violations. I find that the remaining witnesses for the respondent were credible, but they had no evidence, and no firsthand knowledge of any alleged violations of the Civil Service regulations or the rules and regulations of the EMCF. Finally, I **FIND** that the testimony of the appellant was credible, and consistent with his video statements before the inappropriate interrogation techniques were employed.

It is well settled in this jurisdiction that law enforcement may not fabricate evidence in order to coerce a confession. See, New Jersey v. Patton, 362 N.J. Super. 16 (App. Div. 2003). Moreover, the promise of a reduced sentence in exchange for a confession is likewise prohibited in New Jersey and has been held to lead to an involuntary confession that has no evidentiary value. See, New Jersey v. L.H., 239 N.J. 22 (2019). I **FIND** as **FACT** and **CONCLUDE** that both of these principals were violated during the interrogation of the appellant. In addition, a violation of his Weingarten rights occurred when the respondent failed to provide a union representative when

appellant requested one. The respondent does not dispute that appellant asked for union representation, but they continue to maintain that appellant had no right to a union representative during the interrogation. However, an employee in a criminal investigation is entitled to both an attorney under Miranda and a union representative under Weingarten. Miranda protections are not necessarily greater than those in Weingarten, and one does not substitute for the other. See, N.J. Dep't of Human Servs., P.E.R.C. No. 89-16, 14 NJPER 563 (¶ 19236 1988), adopting H.E. No. 88-55, 14 NJPER 374, 378 (¶ 19146 1988); U.S. Postal Service, 241 N.L.R.B. 141, 151–52, 100 LRRM 1520 (1979). The undersigned recognizes that the remedy for a Weingarten violation lies with the Public Employment Relations Commission. However, I **CONCLUDE** that the appellant's Weingarten rights were violated, and this further negated the voluntary nature of the statements made in the interrogation.

To highlight a few of the violations that occurred during the two-hour interrogation by two members of the prosecutor's office and two members of the SID, the appellant was told that they "had DNA evidence against him . . . and juries love DNA evidence." They had no DNA evidence at that point, and the reliability of what was eventually collected was questionable at best. The detective advised the appellant on several occasions, "I know the answers to my questions, but I am going to give you an opportunity to tell me what happened." He told appellant that he believed J.O. and did not believe him. He told the appellant he was "toast," and "if you tell me nothing happened, there is nothing I can do for you." He repeatedly told him that if he confessed, he might get a chance to see his children again. He told him he would get a much lighter sentence if he confessed. The promise of a lighter sentence in exchange for a confession has been held to void the voluntariness of same and render same inadmissible. Misrepresenting evidence that you have against someone is likewise prohibited. Other than the video interrogation of a forced confession by the appellant, the respondent had no credible evidence to prove any of the alleged violations. The only credible evidence was the testimony from the appellant at the hearing.

Accordingly, I **FIND** the follow as **FACT:**

1. Appellant was an employee of EMCF for approximately three years, most recently as an SCO.

2. On September 25, 2016, inmate J.O. came up behind the appellant in a supply closet and gave him a quick kiss. He immediately stepped back and advised her to leave the closet, which she did. Nothing else happened in the supply closet that day.

3. The appellant did not report the incident, as he did not feel the conduct of the inmate was of a nature that needed to be reported.

4. Inmates ask the guards on a regular basis to bring them things such as candy and contraband. These events are seldom reported, and respondent did not demonstrate that anyone had ever submitted a report of such a request by an inmate.

4. Inmate J.O. may have asked appellant to bring candy or Mucinex, which all of the inmates ask for, but he never brought any contraband into the facility for J.O. or anyone else.

5. Respondent had no evidence that any contraband had been brought into the facility by appellant to J.O. or anyone else.

6. The appellant relayed a verbal message to a friend of J.O.'s on one occasion. It was not about anything illegal or illicit, and he did not feel it violated any rules and regulations of the facility.

7. The appellant had no relationship, sexual, intimate, or otherwise, with inmate J.O.

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576, 581 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex Cnty. Park Comm'n,

46 N.J. 138, 147 (1965). The Act sets forth that State policy is to provide appropriate appointment, supervisory, and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). To carry out this policy, the Act authorizes the discipline (and termination) of public employees. N.J.S.A. 11A:2-6.

A civil-service employee who commits a wrongful act related to her 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. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied 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, 149 (1962); In re Polk, 90 N.J. 550, 561 (1982).

The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Therefore, 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, & W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). The appellant herein is charged with violations of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause. He is also charged with violations of HRB 84-17, as amended, C-11, conduct unbecoming a public employee; HRB 84-17, as amended, D-4, improper or unauthorized contact with inmate—undue familiarity with inmates, parolees, their families, or friends. "Conduct unbecoming a public employee" has been interpreted broadly as conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect for governmental employees and confidence in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also, In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

In this case, the respondent has alleged that appellant had oral sex with inmate J.O. They have also alleged that he had an intimate relationship with her, brought her contraband, and was "passing messages" for her. The respondent has the burden to prove these allegations by the preponderance of the credible evidence. On the first claim of oral sex and an intimate personal

relationship with J.O., the respondent has produced no credible evidence to support these allegations. The entire claim is predicated on the video interview with J.O., which I did not find to be credible. Moreover, it was hearsay that was not corroborated by any other credible evidence. J.O. was not produced at the hearing, nor did the respondent attempt to use her sworn testimony from the criminal trial. I **CONCLUDE** that the respondent has failed to demonstrate by a preponderance of the credible evidence that appellant had an intimate relationship with J.O. or had oral sex with her.

The respondent has alleged that even if there was no consensual element to the kiss in the storage closet, the appellant had an obligation to report same. The only credible evidence of what happened in the closet came from the appellant himself, who acknowledged that J.O. came up behind him in the storage closet and gave him a peck. He immediately stepped back and ordered her to return to her cell. The appellant also conceded that he gave a verbal message on one occasion to a friend of J.O.'s on another wing. Finally, the appellant acknowledged that J.O. and other inmates routinely ask for candy and other contraband. He is not aware that anyone ever reports these routine requests which are ignored. There was no competent testimony or evidence that appellant ever brought any contraband into the facility.

The respondent has argued in its post-hearing submission that even if the oral sex has not been demonstrated, under the provision that requires the reporting of "all crimes, misconduct or unusual incidents," the appellant was obligated to report that J.O. gave him a peck in the storage closet, and that she had requested that he bring her contraband. The respondent provides no case law and provides no testimony regarding any examples of what needs to be reported or any training about what constitutes an "unusual incident." Having grouped this language in the same sentence as "crimes" and "misconduct," the implication is that an event should be something that could jeopardize the safety or security of the facility, and something more substantial that an inmate giving him a quick and unexpected kiss. This does not strike the undersigned like a significant or unusual event. Moreover, routine requests by inmates for contraband which are ignored by officers, does not seem to merit reporting.

The remaining allegation, which has been demonstrated by the testimony of the appellant alone, is that he gave another inmate a verbal message for J.O. It was not a

message that would jeopardize the safety and security of the facility, nor does it seem to imply or demonstrate undue familiarity. The cases cited by the respondent in support of the claim of undue familiarity involve conduct such as intimate calls and letters to an inmate, giving massages, playing cards for cigarettes, and other much more egregious conduct than passing one verbal message to another inmate, the substance of which was, "I am mad at you, and I love you." The respondent has not demonstrated any undue familiarity by the appellant.

Accordingly, I **CONCLUDE** that the respondent has failed to meet its burden of demonstrating that appellant had oral sex with J.O. or had any ongoing personal relationship or was guilty of undue familiarity with her. I further **CONCLUDE** that the respondent failed to meet its burden of demonstrating that the appellant brought any contraband into the facility. I further **CONCLUDE** that respondent has failed to demonstrate by a preponderance of the evidence that giving a verbal message to another inmate, the substance of which has no bearing on the safety and security of the facility does not constitute undue familiarity. Finally, I **CONCLUDE** that the respondent has met its burden of demonstrating that, out of an abundance of caution, appellant should have reported that the inmate tried to kiss him or gave him a peck.

PENALTY

Once a determination is made that an employee has violated a statute, regulation, or rule concerning his or her employment, the concept of progressive discipline must be considered. W. New York v. Bock, 38 N.J. 500 (1962). Progressive discipline is not a "fixed and immutable rule to be followed without question." Carter v. Bordentown, 191 N.J. 474, 484 (2007). Indeed, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished record. Ibid.

In determining the appropriate penalty to be imposed, aggravating and mitigating factors should be considered, along with the totality of the circumstances. The appellant has no prior disciplinary record. I have found as fact and concluded that the respondent has failed to prove the majority of the charges. However, I have found as fact and concluded that the appellant should have reported the inmate's misconduct in trying to kiss him or giving him

a peck in the storage closet and, thus one claim of a violation of a rule or regulation has sustained. None of the other allegations have been proven by the respondent. When the aggravating and mitigating factors are weighed regarding the minor infraction that has been demonstrated in this case, removal is not warranted.

I therefore **CONCLUDE** that an appropriate penalty for the appellant's infraction is a twenty-day suspension.

ORDER

I **ORDER** that the charges against the appellant for violations of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause; violations of HRB 84-17, as amended, C-11, conduct unbecoming a public employee; HRB 84-17, as amended, D-4, improper or unauthorized contact with inmate—undue familiarity with inmates, parolees, their families, or friends; HRB 84-17, as amended, D-7, violations of an administrative procedure and/or regulation involving safety and security, are hereby **DISMISSED**, and that the charge of violation of a rule, regulation, policy, procedure, order, or administrative action, in the form of failing to report an unusual incident when J.O. tried to kiss him or gave him a quick peck in the storage closet is hereby **SUSTAINED**. I further **ORDER** a twenty-day suspension be imposed for the one infraction that has been sustained and that the appellant be reinstated, with back pay as a senior correction officer.

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

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

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

July 26, 2021
DATE

Sarah G. Crowley
SARAH G. CROWLEY, ALJ

Date Received at Agency: July 26, 2021

Date Mailed to Parties: July 26, 2021 (emailed)

SGC/nd

APPENDIX

WITNESSES

For Appellant:

Brian Ambroise

For Respondent:

Altario Washington

Aaron Lacey

Kathryn Meakim

EXHIBITS

For Appellant:

For Respondent:

R-1 Final Notice of Disciplinary Action, dated December 4, 2020

R-2 Hearing Officer Decision, dated December

R-3 Preliminary Notice of Disciplinary Action, dated October 7, 2016

R-4 Complaint Warrant, dated October 6, 2016

R-5 SID Criminal Investigation Report, dated November 4, 2016

R-6 SID Supplemental Report, dated March 17, 2020

R-7 New Hire Orientation Checklist

R-8 Acknowledgement of Receipt Forms

R-9 Investigation by Special Investigations Division Policy

R-10 Level I IMP – Sexual Assault/Prison Rape Elimination Act (PREA) Advisor Council

R-11 Zero Tolerance Policy: Prison Sexual Assault

R-12 Standards of Professional Conduct Policy

R-13 Standards of Professional Conduct: State/Inmate Over Familiarity

R-14 Law Enforcement Personnel Rules and Regulations

R-15 DNA Reports

R-16 Video recorded interview with Brian Ambroise

R-17 Video recorded of interview with Janean Owens