



**STATE OF NEW JERSEY**

**DECISION OF THE  
CIVIL SERVICE COMMISSION**

In the Matter of Frank James, Essex  
County, Department of Corrections

CSC Docket No. 2021-1348  
OAL Docket No. CSR 03008-21

Remand to the  
Office of Administrative Law

**ISSUED: March 25, 2022 (HS)**

The appeal of Frank James, a County Correctional Police Officer with Essex County, Department of Corrections, of his removal effective March 9, 2020, on charges, was before Administrative Law Judge Barry E. Moscovitz (ALJ), who rendered his initial decision on February 15, 2022, dismissing the charges and reversing the removal. 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 ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on March 23, 2022, ordered that this matter be remanded to the Office of Administrative Law (OAL).

**DISCUSSION**

The appointing authority removed the appellant on charges of incompetency, inefficiency or failure to perform duties; conduct unbecoming a public employee; neglect of duty; and other sufficient cause. Specifically, it asserted that on January 27, 2020, the appellant entered an unauthorized area and gave contraband, a USB drive containing movies, to an inmate after having initially taken the contraband from the inmate on January 22, 2020. It was also asserted that prior to January 27, 2020, the appellant had failed to do inmate counts; falsified observation reports; fraternized with inmates; failed to properly secure doors; failed to properly supervise meal service; and abandoned his post. Upon the appellant's appeal, the matter was transmitted to the OAL for a hearing as a contested case.

In his initial decision, the ALJ set forth the following findings of fact:

- Tashneke James, County Correctional Police Officer; Mark Horst, County Correctional Police Officer; and Carlos Matos, County Correctional Police Sergeant had no recall of the alleged January 27, 2020 incident or the date on which it was alleged to have occurred, and relied exclusively on the statements they provided on January 27, 2020.
- While the appellant was credible and reliable, the appointing authority's witnesses, especially Tashneke James and Steven Alese, County Correctional Police Lieutenant, were not nearly as credible or reliable. Tashneke James, who was the genesis of this case, appeared to be motivated by self-interest, as did Alese, who appeared to have been tasked to achieve a result.
- Why Alese reviewed the earlier, "non-sequential, seemingly random" dates, *i.e.*, January 12, 18, 19, 21, and 22, 2020, which predate the January 27, 2020 incident by about a week to two weeks, was never explained in his memorandum or at the hearing.
- Alese had no specific recollection of the violations he alleged, so he had to testify from the video surveillance he had reviewed, the notes he had taken, and the memorandum he wrote.
- The warden tasked Alese with the investigation, which Alese explicitly stated at the hearing, and the appointing authority relied on this investigation to remove the appellant from his employment, including the assumption, which undermines the entire investigation, that if the appellant cannot be seen on camera, then he was not doing his duty, which Alese implicitly stated at the hearing. As the appellant testified, the cameras do not provide full coverage of the entire building, so Alese had no idea what the appellant was doing off camera, including whether or not the appellant was doing his duty.
- It was the appellant's belief that many of his co-workers, such as Tashneke James, soured on him from the start because he was injured within the first few weeks of his hiring, and it was this unfortunate start that had led to his targeted suspension and removal.
- Regarding the alleged falsification of observation reports, the appellant explained that tours are sometimes interrupted by phone calls or superior officers, which cannot always be seen on camera. As was noted in Alese's memorandum and elsewhere, the appellant was in fact counseled during some of the tours in question.
- No more specificity was contained in the notices of disciplinary action other than the allegation "fraternized with inmates," and no eyewitness testimony was presented supporting this allegation.

- Regarding his presence in an area without authorization, the appellant explained that there was no such thing as an “unauthorized” area for a correctional officer within the facility, and no policy or procedure was ever presented to indicate otherwise.
- James had no opportunity to log in the USB drive at the time he had confiscated it, exercised judgment that it need not be logged after the long delay, and returned it not knowing it contained movies.
- Regarding the other specifications, they were based on incomplete or partial video surveillance, which is insufficient, especially in the absence of any eyewitness testimony.

The ALJ found that the appointing authority had not proven any of the specifications alleged by a preponderance of the evidence. As such, the ALJ recommended that the charges be dismissed and that the appellant be reinstated to his position of County Correctional Police Officer.

The appointing authority presented the following exceptions to the findings of fact noted above:

- Tashneke James never indicated that she had no recall of the alleged incident or that she relied solely on the statement she provided. Her testimony stated only that “I don’t recall the date or the time because it was a long time ago.” She then testified that she “*witnessed* Frank James [. . .] coming into my building and he went and handed an object to an inmate [. . .]” (appointing authority’s emphasis). She further testified that she viewed him “with my eyes, I was working in Floor Control.”
- Horst never indicated that he had no recall of the alleged incident or that he relied solely on the statement he provided. Horst merely stated, in response to being asked what date the alleged incident occurred, “I don’t really -- if I put that in my report, yes.” Horst then went on to testify as to what he “witnessed or what [he] did on January 27<sup>th</sup>,” specifically that he “called the inmate over to his desk and asked him what [the appellant] just gave him and he then gave me a USB drive [. . .].”
- Matos never indicated that he had no recall of the alleged incident or the date on which it was alleged to have occurred, or that he was relying exclusively on the statement he provided on January 27, 2020.
- The ALJ failed to explain how Tashneke James was motivated by self-interest as her testimony was completely factual and devoid of opinion. He also failed to explain how Alese was motivated by self-interest and wrongfully concluded that he was tasked to achieve a result.

- Alese clearly explained that he was tasked with conducting “an investigation pertaining to a thumb drive that was recovered from an inmate who stated that he got it from [. . .] James [. . .] – that’s what initiated the investigation and then that subsequently turned into a review of a week’s worth of work history.” Further, Alese testified that the investigation turned into a review of a week’s worth of work history because Alese “discovered that [the appellant] had falsified some documentation so we went further back to look at [the appellant’s] day to day operations.” Further, the dates are not “non-sequential, seemingly random dates.” As clearly described in the Preliminary Notice of Disciplinary Action, the appointing authority reviewed the appellant’s five previous shifts, which happened to be January 12, 18, 19, 21, and 22, 2020.
- Alese never stated that he had no independent recollection of the investigation he conducted. Additionally, if disciplinary charges cannot be sustained by a law enforcement agency through the use of video footage, entered into evidence and not objected to by defense counsel, a new standard of proof is being created for Civil Service entities.
- Whether the appellant was doing something else or was somewhere else off-camera is insignificant. What the security footage showed is that he was not where he reported he was on important legal documents.
- The appellant actually testified that “within the first weeks of me being hired I was injured which kind of cast a dark cloud so there were *certain captains and other supervisors* who felt as though they wanted to get rid of me without any cause” (appointing authority’s emphasis). This statement does not include his co-workers such as Tashneke James, who is an officer, not a supervisor or captain. Further, this is counterintuitive to the conclusion made about Alese not learning of the appellant until the investigation and not meeting the appellant until the hearing.
- Interrupted tours should be documented. Alese testified that if one cannot conduct a tour, then that could be documented in the logbook. In fact, the appellant did document in the logbook when he could not conduct a tour because he was allegedly searching for missing food tongs from the kitchen. Further, Alese testified that James was counseled on proper documentation in the logbook twice by his sergeants.
- Rule and Regulation 3:2.1, Prohibited Activities on Duty, states that “[e]mployees shall not engage in prolonged conversations. Conversations should be kept at a minimum except for that which is necessary in the fulfillment of their duties.” Alese testified that “numerous times when I reviewed [the appellant’s] work units he

would just be in the day room talking with inmates for extended periods.”

- There is such a thing as an “unauthorized” area for a correctional officer within the facility. Matos fully explained that the appellant was in an unauthorized area because he was “assigned to a different building.” Matos also stated, “[n]o, [the appellant] wasn’t supposed to be in the area” and “[the appellant] just made it seem like he was supposed to be an officer to the unit so the officer, thinking [the appellant] was a relief officer, opened the door assuming he was going to go do the relief at lunchtime.” Alese also testified that he “looked at the schedule to see if [the appellant] was assigned to that area to even work and he was not, so he was in an unauthorized area of the facility without approval from the supervisor.”
- In the appellant’s own written statement, dated January 27, 2020, he wrote that “*no contraband was found on the drive*, however I had left for my [regular days off] without returning his drive” (appointing authority’s emphasis).
- Alese testified that he reviewed security video footage from the “entire shift.”

The appointing authority thus maintains that it has proven the charges and requests that the appellant’s removal be upheld.

In his reply to exceptions, the appellant urges the Commission to adopt the ALJ’s sound initial decision.

Upon its *de novo* review of the record, the Commission does not agree with the ALJ’s decision to dismiss the charges and reverse the removal. Given the specific examples of testimony in the appointing authority’s exceptions that appear to be completely contrary to what the ALJ summarized in his initial decision, the Commission finds that it is appropriate to remand this matter to the OAL to allow the ALJ to expand on his recitation of the testimony in light of the contrary positions presented in the exceptions and further expand on, modify, or change his credibility determinations.

### ORDER

The Commission orders that this matter be remanded to the Office of Administrative Law for further proceedings as set forth above.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 23<sup>RD</sup> DAY OF MARCH, 2022

*Deirdre' L. Webster Cobb*

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Deirdré L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Allison Chris Myers  
Director  
Division of Appeals and Regulatory Affairs  
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Attachment



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. CSR 03008-21  
AGENCY DKT. NO. 2021-1348

**IN THE MATTER OF FRANK JAMES,  
ESSEX COUNTY DEPARTMENT OF  
CORRECTIONS.**

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**Patrick P. Toscano, Jr., Esq.**, for appellant Frank James

**Jill A. Caffrey**, Assistant County Counsel, for respondent Essex County  
Department of Corrections (Courtney M. Gaccione, County Counsel,  
attorney)

Record Closed: January 13, 2022

Decided: February 15, 2022

**BEFORE BARRY E. MOSCOWITZ, ALJ:**

**STATEMENT OF THE CASE**

Respondent, the Essex County Department of Corrections (DOC), removed appellant, Frank James, a correction officer at Northern State Prison, from his position for allegedly violating a litany of departmental policies, including allegedly giving contraband to an inmate. Should James be removed from his position when a preponderance of the evidence does not exist that he gave the inmate the contraband or violated any of these policies? No. The appointing authority must prove its charges and specifications by a preponderance of the evidence. See Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

## PROCEDURAL HISTORY

On March 9, 2020, the DOC served James with a Preliminary Notice of Disciplinary Action. The DOC charged James with incompetency, inefficiency, or failure to perform duties in violation of N.J.A.C. 4A:2-2.3(a)(1); conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7); and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12). That last alleged violation constituted alleged violation of numerous departmental policies and procedures (PS.CLS.001, Counts Control; PS.CUS.006.02, General Housing Unit Post Orders; PS.CUS.046, Contraband and Search of Inmate/ICE Detainee; PS.CUS.006.33, Close Custody Special Housing Unit), as well as numerous departmental rules and regulations (3:1.23, Knowledge of the Law and Regulations; 3:10.5, Truthfulness; 1:2.33, Neglect of Duty; 3:1.1, Standard of Conduct; 3:1.9, Performance of Duty; 3:2.1, Prohibited Activities on Duty; 3:8.8, Control of Contraband; 3:1.34, Reporting Unusual Incidents or Occurrences on Duty).

The notice specified that on January 27, 2020, James entered an unauthorized area and gave an inmate contraband, a USB drive containing movies. In addition, the notice specified that on six dates between January 12, 2020, and January 27, 2020, James failed to conduct facility tours and inmate counts. Likewise, the notice specified that James falsified close-custody observation sheet reports, fraternized with inmates, failed to ensure that doors were properly secured, failed to properly supervise the inmate population's meal service, and abandoned his post for sixteen minutes. Finally, the notice specified that James failed to report the contraband that he seized from an inmate, and that he failed to take the appropriate steps to secure and inventory it. As a result, the DOC suspended James and sought his removal.

James waived his right to a hearing, and on February 26, 2021, the DOC issued a Final Notice of Disciplinary Action, removing James from his position as a correction officer, effective March 9, 2020.



On March 11, 2021, James appealed the determination to the Office of Administrative Law under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On March 22, 2021, James perfected his appeal, and on April 6, 2021, the case was assigned to me for hearing.

On May 24, 2021, I held the hearing; on November 17, 2021, James filed his post-hearing brief; and on January 13, 2022, the DOC filed its post-hearing brief.

### **DISCUSSION AND FINDINGS OF FACT**

#### I.

Steve Alese is the officer at Northern State Prison who investigated James on behalf of the DOC. Alese began his career as a correction officer in 2004 and is currently a captain. He was serving as a lieutenant when the warden of Northern State Prison tasked him with the investigation in this case.

Alese summarized that he looked at the work schedule for the date of the alleged incident; that he reviewed the video surveillance from that day; and that he reviewed the reports that were submitted about it. Alese also stated that he confiscated the USB drive, reviewed it, and determined that it did not contain any pornography as was suspected. Nevertheless, Alese said that it did contain "pirated movies."

Alese asserted that such movies are still considered contraband, and concluded that James should have reported them to his supervisors—and that James should have neither taken the USB drive home nor given it back to the inmate.

Tashneke James is a correctional police officer at Northern State Prison who reported that she saw James enter the building on January 27, 2020, and hand the inmate the USB drive. She had no recall of the alleged incident or the date on which it was

alleged to have occurred, and relied exclusively on the statement she provided on January 27, 2020. In her Incident Report Summary, Tashneke James added that she contacted another officer, Mark Horst, who confiscated the USB drive from the inmate. On cross-examination, Tashneke James verified that she knew nothing about the circumstances surrounding the USB drive.

Horst also testified. He too had no recall of the alleged incident or the date on which it was alleged to have occurred, and likewise relied exclusively on the statement he provided on January 27, 2020. In his Incident Report Summary, Horst stated that Tashneke James informed him that Frank James gave a USB drive to an inmate, that Horst took the USB drive from the inmate, and that Horst handed the USB drive to Tashneke James. At the hearing, Horst added that he reviewed the USB drive and that it contained movies from the theater.

Carlos Matos was the supervising officer at the time. He was and remains the sergeant who oversees the housing units, including their staff and inmates. Like the other witnesses, Matos had no recall of the alleged incident or the date on which it was alleged to have occurred, and relied exclusively on the statement he provided on January 27, 2020. In his Incident Report Summary, he merely repeated what the other two officers had written in their statements.

At the hearing, Matos added that James entered the building “without authorization,” and that he too reviewed the USB drive to discover the movies on it. Matos explained that USB drives are permissible if they contain “legal paperwork,” but that movies were not allowed. On cross-examination, Matos admitted that correction officers can enter different areas of the building, and that he did not know the circumstances of why James was in that area of the building on that day.

## II.

Alese did not review any video surveillance from January 27, 2020, but he did review video surveillance from earlier dates—January 12, 2020; January 18, 2020; January 19, 2020; and January 21, 2020—and testified that James engaged in additional

misconduct on those dates, which he memorialized in a memorandum to the warden on February 12, 2020. Why Alese reviewed these earlier, non-sequential, seemingly random dates, which predate the date of the incident by about a week to two weeks, was never explained in the memorandum or at the hearing. Regardless, Alese had no specific recollection of the violations he alleged, so he had to testify from the video surveillance he had reviewed, the notes he had taken, and the memorandum he wrote. Alese also referred to the relevant logbook entries that he believed James had falsified and the departmental rules and regulations that he believed James had violated.

Regarding the alleged misconduct on January 12, 2020, Alese summarized that James failed to personally observe all inmates twice per hour during his shift. Alese specified that James should have completed nine tours during his shift—but that he had completed only four and then recorded that he had completed five. In addition, Alese specified that James failed to secure the doors to the recreation area. Moreover, Alese specified that James failed to take formal physical counts of the inmates, yet recorded on his count slip that he had. Finally, Alese specified that James failed to document the following:

- Inventory of all non-restricted tools and hazardous substances
- Barber services and inventory
- Use of the laundry room
- Food cart arrival times
- Inspection of the food carts
- Mealtimes
- Lock-in times and their respective counts
- Utensil counts
- [People] entering or exiting the housing area
- Times facility counts clear

[C-19.]

Regarding the alleged misconduct on January 18, 2020, Alese summarized that James again failed to personally observe all inmates twice per hour during his shift. Alese specified that James should have completed fourteen tours during his shift—but that he had completed only five and then recorded that he had completed six. In addition, Alese

specified that James failed to monitor the meal service. Moreover, Alese specified that James failed to secure doors in general and doors to areas not in use in particular. Finally, Alese specified that James fraternized with inmates in violation of departmental rules and regulations and noted, parenthetically, that James was instructed by a superior officer to keep accurate logbook entries.

Regarding the alleged misconduct on January 19, 2020, Alese summarized that James yet again failed to personally observe all inmates twice per hour during his shift. Alese specified that James should have completed ten tours during his shift—but that he had completed only six and then recorded that he had completed seven. In addition, Alese specified that James failed to make proper entries in the logbook and again noted, parenthetically, that James was again instructed by a superior officer to keep accurate logbook entries. Moreover, Alese specified that James falsified a logbook entry when he wrote that he conducted a search for missing tongs. Finally, Alese specified that James fraternized with inmates in violation of departmental rules and regulations, that James again failed to monitor the meal service for the inmates, and that James again failed to document the following:

- Inventory of all non-restricted tools and hazardous substances
- Barber services and inventory
- Use of the laundry room
- Food cart arrival times
- Inspection of the food carts
- Mealtimes
- Lock-in times and their respective counts
- Utensil counts
- [People] entering or exiting the housing area
- Times facility counts clear

[C-19.]

Regarding the alleged misconduct on January 21, 2020, Alese summarized that James once again failed to personally observe all inmates twice per hour during his shift. Alese specified that James should have completed fourteen tours during his shift—but that he had completed only six. In addition, Alese specified that James once again failed

to monitor the meal service for the inmates. Moreover, Alese specified that James failed to take formal physical counts of the inmates, yet recorded on his count slip that he did. Finally, Alese specified that James once again failed to document the following:

- Inventory of all non-restricted tools and hazardous substances
- Barber services and inventory
- Use of the laundry room
- Food cart arrival times
- Inspection of the food carts
- Mealtimes
- Lock-in times and their respective counts
- Utensil counts
- [People] entering or exiting the housing area
- Times facility counts clear

[C-19.]

Alese concluded his memorandum (which contained the above summaries of specific findings from particular dates) with a list of ultimate findings from all dates at issue:

1. James falsified official government records by documenting tours that were not in fact completed as evidenced by video surveillance. For the four-day work period reviewed, James should have completed, at a minimum, forty-seven tours. Within that timeframe, he made twenty-one actual tours, documenting twenty-four tours being completed. Of the twenty-one actual tours completed, two were not complete tours.
2. James[’s] blatant disregard for facility policy in regard to facility tours is negligent to the care and custody of the inmates as well as [he] creates substantial risk to the inmate population in that he fails to monitor their health, safety, and well-being.
3. James was instructed by two sergeants within a two-day period of the importance of maintaining an accurate logbook in order to justify the fact that he had in fact been socializing with inmates on the unit within that timeframe.

4. Regardless of his work assignment, James spends the majority of his shift socializing with the inmates and often watching television.

5. On two occasions, James falsified his count slip by documenting counts that were not taken.

[C-19.]

Significantly, Alese did not interview James during his investigation. In fact, Alese did not even learn of James until the investigation, and he had never met James until the hearing. Indeed, Alese was not even familiar with the Attorney General Guidelines for Internal Affairs investigations, let alone did he receive training on any of them. Nevertheless, the warden tasked Alese with the investigation, which Alese explicitly stated at the hearing, and the Department relies on this investigation to remove James from his employment, including the assumption, which undermines the entire investigation, that if James cannot be seen on camera, then he was not doing his duty, which Alese implicitly stated at the hearing. As James would later testify, the cameras do not provide full coverage of the entire building, so Alese has no idea what James is doing off camera, including whether or not James is doing his duty.

### III.

Frank James testified that he has been a correction officer since August 2014, and that he has never received any discipline before this case. James further testified that he was told in January 2020 that he was to be promoted to administration, where his training and experience on Wall Street as an accountant and trader could be put to better use in helping with, among other things, budgetary issues. Yet James testified that it was his belief that many of his coworkers, such as Tashneka James, soured on him from the start because he got injured within the first few weeks of his hiring, and it was this unfortunate start that has led to his targeted suspension and removal today.

A.

James explained at the hearing what happened on January 22, 2020, the date Tashneka James reported him to her superiors and promoted her belief that James had engaged in misconduct by entering into “her area” (an area in which James had not been assigned) and handing a USB drive to an inmate.

James testified that on January 22, 2020, he heard an inmate brag—right in front of him—that the inmate had pornography on a USB drive, so he told the inmate to hand him the USB drive. Within minutes, a Code 33 was called, a code concerning fights, which mobilized James, along with thirty other correction officers. James explained that another Code 33 was called two more times within the next twenty minutes, so by the time all the codes had been resolved, and he had finished all his paperwork, his shift was over. Since his shift was over, James—who had placed the USB drive in his vest after the inmate handed it to him—left his vest, together with the USB drive—which remained in it—in his locker until he returned to work on January 22, 2020. In other words, James did not take the USB drive home with him. James further explained that he did not review it and could not review it even if he had wanted to because he had no way of doing so at the facility.

James explained that when he returned to work on January 22, 2020, which is when he was scheduled to return to work, he returned the USB drive to the inmate for several reasons. First, James understood that the inmate, with whom he had a good guard-to-inmate relationship, confessed that the USB drive did not have pornography on it as soon as James confiscated it. Second, James understood that the warden’s secretary had issued the USB drive to the inmate and, as a result, thought it should be given back to the inmate, as the inmate had only been joking about it containing pornography. Finally, James stated in complete candor that he had thought too much time had passed for him to do anything other than return that USB drive. It was that simple.

Regarding the other allegations, James had simple explanations for them too.

B.

Regarding the tours, James explained that the cameras do not show what he did off camera, and that the timeclocks of the cameras and the timeclocks of the computers do not match. James further explained that while he surely made mistakes, he never documented a tour that he did not complete. Moreover, James explained that he never had a problem with his counts not adding up on his shift—especially when the counts at the end of his shift have to align with the counts from the start of the next shift.

Regarding the alleged falsification of logs, James explained that tours are sometimes interrupted by phone calls or superior officers, which cannot always be seen on camera. James asked rhetorically, “How can you complete a tour if you are interrupted by a sergeant for counseling?” As was noted in Alese’s memorandum and elsewhere, James was in fact counseled during some of the tours in question.

Regarding the alleged fraternization with inmates, James explained that he did not interact with inmates any differently than any other correction officer. In fact, James exclaimed that he did not even know what was meant by this allegation. To be sure, no more specificity is contained in the notices of disciplinary action other than the allegation “fraternized with inmates,” and no eyewitness testimony was presented supporting this allegation. Indeed, the references to the video surveillance in Alese’s memorandum are nothing more than editorials or opinions without support. As such, these references to the videos and these statements in and of themselves cannot support the claim that James fraternized with inmates in violation of departmental policy and procedure. More is needed than lay opinion.

The same is true regarding the claim that James failed to secure doors in violation of departmental policy and procedure. Neither eyewitness testimony nor expert opinion was presented either explicating or demonstrating any such failure. Once again, James had no idea what was meant by his allegation.

Regarding the alleged failure to properly supervise meals, James explained that an image of an inmate with two trays does not mean that the inmate took two trays



because he was not properly supervised. As James further explained, inmates sometimes give each other their trays, and inmates are sometimes permitted to take a second tray when there are leftovers. In these particular instances, no evidence exists that these inmates had two trays because they were not properly supervised.

Regarding the alleged abandonment of his post, James explained that he had to use the restroom in one instance and write a memorandum in another. In fact, James further explained that he was directed to write the memorandum, and that he locked the pod each time he left it. Indeed, James explained that he even informed floor control that he had left his post—because floor control had to let him out of the pod for him to do so. Regardless, no evidence was presented that the doors to the pod were not locked or fully secured.

Regarding his presence in an area without authorization, James explained that there is no such thing as an “unauthorized” area for a correction officer within the facility, and no policy or procedure was ever presented to indicate otherwise.

James was a credible and reliable witness. He was candid in what he said and forthright in how he said it, even when it was against his self-interest, and he has no prior discipline. I did not find the DOC's witnesses, however, especially Tashneka James and Alese, to be nearly as credible or reliable. I give their testimony little weight. Tashneka James, who was the genesis of this case, appeared to be motivated by self-interest, as did Alese, who appears to have been tasked to achieve a result.

Given this discussion of the facts, I **FIND** that the DOC has not proven by a preponderance of the evidence any of the allegations contained in its specifications.

### **CONCLUSIONS OF LAW**

#### I.

As a threshold issue, I will address two procedural arguments that James asserted at the start of the hearing. First, James moved at the start of the hearing to dismiss the

case for the DOC's failure to designate a hearing within 30 days, citing N.J.S.A. 40A:14-147, and commence a hearing within 30 days of the service of the complaint, citing both N.J.S.A. 40A:14-147 and N.J.S.A. 40A:14-149. Second, James moved to dismiss the case for the DOC's failure to file the complaint within 45 days after obtaining sufficient information upon which the complaint is based, citing N.J.S.A. 40A:14-147, once more. Both statutes are reproduced below in full.

Here is N.J.S.A. 40A:14-147:

Except as otherwise provided by law, no permanent member or officer of the police department or force shall be removed from his office, employment or position for political reasons or for any cause other than incapacity, misconduct, or disobedience of rules and regulations established for the government of the police department and force, nor shall such member or officer be suspended, removed, fined or reduced in rank from or in office, employment, or position therein, except for just cause as hereinbefore provided and then only upon a written complaint setting forth the charge or charges against such member or officer. The complaint shall be filed in the office of the body, officer or officers having charge of the department or force wherein the complaint is made[,] and a copy shall be served upon the member or officer so charged, with notice of a designated hearing thereon by the proper authorities, which shall be not less than 10 nor more than 30 days from date of service of the complaint.

A complaint charging a violation of the internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. The 45-day time limit shall not apply if an investigation of a law enforcement officer for a violation of the internal rules or regulations of the law enforcement unit is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State. The 45-day limit shall begin on the day after the disposition of the criminal investigation. The 45-day requirement of this paragraph for the filing of a complaint against an officer shall not apply to a filing of a complaint by a private individual.

A failure to comply with said provisions as to the service of the complaint and the time within which a complaint is to be filed shall require a dismissal of the complaint.

The law enforcement officer may waive the right to a hearing and may appeal the charges directly to any available authority specified by law or regulation, or follow any other procedure recognized by a contract, as permitted by law.

[N.J.S.A. 40A:14-147 (emphasis added).]

Here is N.J.S.A. 40A:14-149:

If any member or officer of the police department or force shall be suspended pending a hearing as a result of charges made against him, such hearing, except as otherwise provided by law, shall be commenced within 30 days from the date of the service of the copy of the complaint upon him, in default of which the charges shall be dismissed and said member or officer may be returned to duty.

[N.J.S.A. 40A:14-149 (emphasis added).]

Regarding the first argument, the Preliminary Notice of Disciplinary Action was served on March 9, 2020, and a hearing was designated for April 2, 2020, which means the DOC cannot be in violation of N.J.S.A. 40A:14-147, for having failed to designate a hearing within 30 days of the service of the complaint. James also cites King v. Ryan, 262 N.J. Super. 401 (App. Div. 1993), in support of his argument, but that case does not apply because in that case, a hearing was not designated until well after the 30 days. Likewise, the DOC cannot be in violation of N.J.S.A. 40A:14-149, for having failed to commence a hearing within 30 days of the service of the complaint, because James waived the hearing. Therefore, I **CONCLUDE** that the DOC did not violate either of these statutory requirements.

Regarding the second argument, the DOC alleged that James gave an inmate contraband on January 27, 2020, and as part of its investigation the DOC reviewed video surveillance from select days between January 12, 2020, and January 27, 2020, before it filed its complaint on March 9, 2020. Since 41 is the number of days between January

27, 2020 (the earliest possible date that the DOC obtained sufficient information upon which to base the complaint) and March 9, 2020 (the date when the DOC filed the complaint), the DOC cannot be in violation of N.J.S.A. 40A:14-147, for having failed to file the complaint within 45 days after obtaining sufficient information upon which the complaint is based. Therefore, I **CONCLUDE** that the DOC did not violate this statutory requirement either.

## II.

In appeals concerning major disciplinary action, the appointing authority bears the burden of proof. N.J.A.C. 4A:2-1.4(a). The burden of proof is by a preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. at 149, and the hearing is de novo, Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980). On such appeals, the Civil Service Commission may increase or decrease the penalty, N.J.S.A. 11A:2-19, and the concept of progressive discipline guides that determination, In re Carter, 191 N.J. 474, 483–86 (2007). Thus, an employee's prior disciplinary record is inherently relevant to determining an appropriate penalty for a subsequent offense, Id. at 483, and the question upon appellate review is whether such punishment is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness," Id. at 484 (quoting In re Polk, 90 N.J. 550, 578 (1982) (internal quotes omitted)).

In this case, I found that the DOC had not proven by a preponderance of the evidence allegations contained in its specifications. More pointedly, James had no opportunity to log in the USB drive at the time he had confiscated it, exercised judgement that it need not be logged after the long delay, and returned it not knowing it contained movies. Even if James should have logged in the USB drive, even after the fact, James has no prior discipline and should receive nothing more than a retraining on the rule. To do more, by imposing discipline, would only be in slavish obedience to a rule, not in service to the correction officer, in contravention of progressive discipline.

Regarding the other specifications, they were based on incomplete or partial video surveillance, which is insufficient, especially in the absence of any eyewitness testimony.

Each on its own was specious, and together even more so. In short, the investigation was incomplete, and its conclusions and recommendations were unsupported.

Accordingly, I **CONCLUDE** that the DOC has not proven by a preponderance of the evidence any of the charges contained in its notices of disciplinary action, and that this case should be **DISMISSED**.

### **ORDER**

Given my findings of fact and conclusions of law, I **ORDER** that James be reinstated to his position of correction officer, that he be **AWARDED** all back pay, seniority, and costs, including all attorney fees associated with this appeal, and that this case against him be **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked

"Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 15, 2021

DATE

  
BARRY E. MOSCOWITZ, ALJ

Date Received at Agency:

February 15, 2022

Date Mailed to Parties:

February 15, 2022

dr

**APPENDIX**

Witnesses

For Appellant:

Frank James

For Respondent:

Tashneke James

Mark Horst

Carlos Matos

Steven Alese

Documents

For Appellant:

None

For Respondent:

- C-1 Final Notice of Disciplinary Action dated February 26, 2021
- C-2 Preliminary Notice of Disciplinary Action dated March 9, 2020
- C-3 Incident Report Summary by Tashneke James dated January 27, 2020
- C-4 Incident Report Summary by Horst dated January 27, 2020
- C-5 Incident Report Summary by Matos dated January 27, 2020
- C-6 Memo from James dated January 27, 2020
- C-7 Close Custody Report for Cell 220-02 dated January 22, 2020
- C-8 Close Custody Report for Cell 222-01 dated January 22, 2020
- C-9 Close Custody Report for Cell 228-01 dated January 22, 2020
- C-10 Close Custody Report for Cell 230-01 dated January 22, 2020
- C-11 Close Custody Report for Cell 120-01 dated January 22, 2020
- C-12 Close Custody Report for Cell 122-01 dated January 22, 2020
- C-13 Close Custody Report for Cell 123-01 dated January 22, 2020
- C-14 Close Custody Report for Cell 124-01 dated January 22, 2020

- C-15 Close Custody Report for Cell 125-01 dated January 22, 2020
- C-16 Close Custody Report for Cell 128-10 dated January 22, 2020
- C-17 Close Custody Report for Cell 129-10 dated January 22, 2020
- C-18 Close Custody Report for Cell 130-01 dated January 22, 2020
- C-19 Memo from Alese dated February 12, 2020
- C-20 Notes from Alese dated January 12, 2020
- C-21 Handwritten Logbook dated January 12, 2020
- C-22 Typewritten Logbook dated January 18, 2020
- C-23 Handwritten Logbook dated January 17, 2020
- C-24 Memo from Sergeant Guido dated February 7, 2020
- C-25 Typewritten Logbook dated January 19, 2020
- C-26 Handwritten Logbook dated January 19, 2020
- C-27 Memo from Sergeant Lopez to Alese dated February 7, 2020
- C-28 Typewritten Logbook dated January 21, 2020
- C-29 Handwritten Logbook dated January 21, 2020
- C-30 PS.CUS.046, Contraband and Search of Inmate/ICE Detainees and Facility, Effective February 1, 2007, Revised August 2016
- C-31 PS.CUS.006.33, Special Housing Unit (SHU)—Post Order, Effective June 11, 2012, Revised December 2016
- C-32 PS.CUS.006.02, Post Order—General Housing Unit, Effective March 1, 2008, Revised September 2016
- C-33 PS.CLS.001, Counts Control, Effective February 1, 2007, Revised January 2016
- C-34 Rules and Regulations Manual, Effective July 11, 2007, Revised August 2016
- C-35 Video dated January 22, 2020
- C-36 Video dated January 12, 2020
- C-37 Video dated January 18, 2020
- C-38 Video dated January 19, 2020
- C-39 Video dated January 21, 2020