



STATE OF NEW JERSEY

 DECISION OF THE
 CIVIL SERVICE COMMISSION

 In the Matter of Mark Griffith,
 Mercer County Correction Center

 CSC Docket Nos. 2021-1717, 2021-
 1718 and 2021-1719
 OAL Docket Nos. CSV 05209-21, CSV
 05211-21 and CSV 05212-21

ISSUED: MARCH 15, 2023

The appeals of Mark Griffin, County Correctional Police Officer, Mercer County Correction Center, of his 10, 15 and 20 working day suspensions, on charges, were heard¹ by Administrative Law Judge William T. Cooper, III (ALJ), who rendered his initial decision on January 27, 2023. No exceptions were filed.

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 15, 2023, adopted the ALJ's Findings of Fact and Conclusions and his recommendation to uphold the 10 working day suspension, reverse the 15 working day suspension, and modify the 20 working day suspension to a 15 working day suspension.

The Commission makes the following comment. In his initial decision, the ALJ refers to the appointing authority's penalty schedule. The Commission notes that it is not bound by the appointing authority's penalty schedule in determining the proper penalty. *See In the Matter of Gregory McDaniel*, Docket No. A-5583-02T2 (App. Div. May 24, 2004); *In the Matter of Leonard Wilson* (MSB, decided April 6, 2005); *In the Matter of Patricia Everingham* (MSB, decided March 13, 2003); *In the Matter of George Roskilly* (MSB, decided November 20, 2002). Nevertheless, in its *de novo* review of the penalties imposed, it agrees with the ALJ regarding the suspensions levied. These suspensions reflect the fact that the appellant has repeatedly violated the appointing authority's policies and serve as sufficient warning to the appellant that any future infractions may lead to increasingly higher disciplinary penalties, including removal.

¹ The ALJ noted that these appeals were not consolidated, but rather, "heard together."

Since the 15 working day suspension has been reversed, the appellant is entitled to 15 working days of back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10(d)3. He is also entitled to reasonable counsel fees for the reversed suspension pursuant to *N.J.A.C.* 4A:2-2.12. The Commission notes, however, under no circumstances should counsel fees exceed 33% of the total counsel fees for all three matters.

Regarding the 20 working day suspension modified to a 15 working day suspension, the appellant is entitled to five working days of back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10(d)3. However, the appellant is not entitled to counsel fees for this matter. *N.J.A.C.* 4A:2-2.12(a), which provides for the award of counsel fees 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 the disciplinary appeal is the merits of the charges. See *Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121,128 (App. Div. 1995); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). While the penalty was modified by the Commission, charges were sustained, and major discipline was imposed. Consequently, as appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12, counsel fees must be denied for that matter.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning counsel fees are finally resolved.

ORDER

10 Working Day Suspension

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified and affirms the 10 working day suspension.

15 Working Day Suspension

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was not justified and reverses that action. The Commission further orders that the appellant be granted 15 days of back pay, benefits, and seniority. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10(d)3. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission also orders reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12(a). However, under no circumstances should counsel fees for this matter exceed 33% of the total counsel fees for all three matters.

Proof of income earned, and an affidavit in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Pursuant to *N.J.A.C.* 4A:2-2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of counsel fees.

20 Working Day Suspension

The Commission finds that the action of the appointing authority in suspending the appellant was justified and modifies the 20 working day suspension to a 15 working day suspension. The Commission further orders that the appellant be granted five days of back pay, benefits, and seniority.

The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10(d)3. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. 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 counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to R. 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF MARCH, 2023



Allison Chris Myers
Acting Chairperson
Civil Service Commission

Inquiries
and
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. CSV 05209-21,
CSV 05211-21 and CSV 05212-
21¹

AGENCY DKT. NOS. #2021-
1717, #2021-1718 and #2021-
1719

**IN THE MATTER OF MARK GRIFFITH,
MERCER COUNTY CORRECTIONS CENTER.**

Michael P. DeRose, Esq., for appellant Mark Griffith (Crivelli, Barbati and DeRose,
LLC, attorneys)

Michael A. Amantia, Esq., for respondent Mercer County Corrections Center
(Paul R. Adezio, Mercer County Counsel, attorney)

BEFORE **WILLIAM T. COOPER, III**, ALJ:

Record Closed: December 14, 2022

Decided: January 27, 2023

¹ These cases, although not consolidated, were heard together.

STATEMENT OF THE CASE

The appellant, Mark Griffith, a county correctional police officer (CO) at respondent, Mercer County Corrections Center (County), appeals three disciplinary actions seeking the imposition of major discipline, namely ten-, fifteen-, and twenty-day working suspensions, for three alleged violations of N.J.A.C. 4A:2-2.3(a)(4) (chronic or excessive absenteeism or lateness); N.J.A.C. 4A:2-2.3(a)(6) (conduct unbecoming a public employee); N.J.A.C. 4A:2-2.3(a)(12) (other sufficient cause); and Mercer County Corrections Center Standards and Operating Procedures A-6 (Unreasonable excuse for lateness of less than fifteen minutes), specifically, seven minutes, and fifteen minutes, and steps 4, 5, and 6, respectively, occurring on December 23, 2019, December 28, 2019, and June 4, 2020.

PROCEDURAL HISTORY

On December 30, 2019, the County filed a Preliminary Notice of Disciplinary Action (PNDA) against appellant charging that on December 23, 2019, the following violations were committed: N.J.A.C. 4A:2-2.3(a)(4), chronic or excessive absenteeism or lateness; 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)(11) other sufficient cause, specifically, violation of the Mercer County Corrections Center Table of Offenses and Penalties: A-6 Unreasonable excuse for lateness of less than fifteen minutes. Based upon appellant's disciplinary history a suspension of ten working days was sought.

On January 10, 2020, the County filed a PNDA against appellant charging that on December 28, 2019, the following violations were committed: N.J.A.C. 4A:2-2.3(a)(4), chronic or excessive absenteeism or lateness; 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)(11) other sufficient cause, specifically, violation of the Mercer County Corrections Center Table of Offenses and Penalties: A-6 Unreasonable excuse for lateness of less than fifteen minutes. Based upon appellant's disciplinary history a suspension of fifteen working days was sought.

On June 16, 2020, the County filed a PNDA against appellant charging that on June 4, 2020, the following violations were committed: N.J.A.C. 4A:2-2.3(a)(4), chronic or excessive absenteeism or lateness; 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)(11) other sufficient cause, specifically, violation of the Mercer County Corrections Center Table of Offenses and Penalties: A-6 Unreasonable excuse for lateness of less than fifteen minutes. Based upon appellant's disciplinary history a suspension of twenty working days was sought.

The appellant requested a departmental hearing on all three PNDA's which was held on March 12, 2021. A Final Notice of Disciplinary Action (FNDA) was issued to appellant on April 16, 2021, sustaining all the charges and suspending him without pay for a total period of forty-five working days.

Appellant timely appealed and the matters were transmitted to the Office of Administrative Law (OAL) where they were filed as contested cases on June 15, 2021:

- CSV 05209-2021 for violations occurring on December 23, 2019, resulting in a suspension of ten working days.
- CSV 05211-2021 for violations occurring on December 28, 2019, resulting in a suspension of fifteen working days.
- CSV 05212-2021 for violations occurring on June 4, 2020, resulting in a suspension of twenty working days.

N.J.S.A. 52:14 B-1 to-15; N.J.S.A. 52:14 F-1 to-13.

On September 16, 2021, the County filed a motion for summary decision. On October 29, 2021, the appellant filed a response to the motion. On January 10, 2022, an Order denying the motion was entered.

A plenary hearing was conducted on August 15, 2022, via zoom. The record was held open for the parties to submit closing statements. Post-hearing submissions were received on behalf of appellant and respondent, and on December 14, 2022, the record closed.

FACTUAL DISCUSSION

Testimony

For respondent

Michael Kownacki (Kownacki) testified that he is employed as a Captain at the County. His duties include overseeing operations, assisting the Warden and Deputy Warden with supervision and discipline of employees. The discipline that he is engaged in is for time and attendance violations. He explained that the County uses the “Kronos Timekeeping System.” This system measures an individual’s “bio-metrics” through a scan of their hand to verify identity. When an employee’s hand is scanned the system also notes the time of arrival.

Kownacki identified Standard Operating Policy (SOP) number 136 titled “Lateness” as the applicable policy in this matter. Further, he explained that pursuant to the SOP, if an employee arrives late for the start of their shift, they are required to report to the “master control room” to receive a late slip.² The late slip provides an employee with an opportunity to explain the reason for their lateness. According to Kownacki, a supervisor does not have to issue a late slip in every instance and a failure of a late slip being issued does not excuse an employee’s lateness.

Kownacki addressed each of the four incidents of lateness involving appellant:

- CSV 05209-2021: On December 23, 2019, the appellant reported to work at 7:07 a.m. when he was due in at 7:00 a.m. Appellant had previously received discipline for lateness making this infraction a step four violation. Pursuant to County policy, a suspension of ten working days was imposed.

² SOP 136 is not the current County policy for lateness; however, it was in effect in 2018 when the alleged infractions in this matter occurred.

- CSV 05211-2021: On December 28, 2019, the appellant reported to work at 6:04 a.m. when he was due in at 6:00 a.m. Appellant had previously received discipline for lateness making this infraction a step five violation. Pursuant to County policy, a suspension of fifteen working days was imposed.
- CSV 05212-2021: On June 4, 2020, the appellant reported to work at 11:15 p.m. when he was due in at 11:00 p.m. Appellant had previously received discipline for lateness making this a step six violation. Pursuant to County policy, a suspension of twenty working days was imposed.

Kownacki advised that the appellant was not issued late slips on either December 23 or 28, 2019, by his supervisor, and he is unsure as to why late slips were not issued. However, he noted that per County policy a supervisor does not have to issue a late slip in every instance and a failure of a late slip being issued does not excuse an employee's lateness. Further, a CO who arrives late is free to notify a supervisor to explain the reason for the lateness. In these incidents the appellant did not offer any explanation or provide any documentation as to why he had arrived late.

On June 4, 2020, appellant was issued a late slip but did not provide an explanation as to why he arrived late.

Kownacki advised that the Mercer County Corrections Center Table of Offenses and Penalties sets forth a list of offenses and the penalties to be imposed for violations, would depend upon the nature of the infraction and how many times it has occurred. The appellant here was charged with offenses under A-6, "Unreasonable excuse for lateness of less than 15 minutes." The penalties sought were for fourth, fifth, and sixth infractions and required the imposition of major discipline, namely ten-, fifteen-, and twenty-day working suspensions, respectively.

On cross-examination Kownacki acknowledged that he was unaware that the appellant had been called in late to cover an emergency shift on December 28, 2019. He explained that emergency shifts involve the need for additional COs to cover "inmate

suicide watches," hospital runs, or when there is a CO shortage at the facility. Kownacki also advised that when a CO is called in for an emergency shift, they have one hour to arrive at the facility.

For appellant

Mark Griffith (appellant) testified that he is a corrections officer and has been, employed by the County for approximately twenty-one years. His wife of thirty years suffered a severe illness and long-term hospitalization for treatment and double leg amputation in 2019. She passed away on November 5, 2019. After the loss of his wife appellant suffered from depression and admitted that he was not attentive to his affairs.

Appellant conceded that he had numerous violations for lateness. He readily admitted that he was guilty of the infractions that occurred on December 23, 2019, and June 4, 2020.

On the morning of December 28, 2019, the appellant was off duty and recalled being contacted around 5:20 a.m. and offered the opportunity to work an emergency shift. He agreed to work the shift but advised the supervisor that he would not be able to get to the work by 6:00 a.m. The supervisor responded by telling him to "get there as soon as possible." Upon his arrival at 6:04 a.m. he knocked on the window of the control booth to let his supervisor know he was present. He was not issued a late slip because of his arriving four minutes late.

LEGAL ANALYSIS AND CONCLUSION

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 in light of its rationality or internal consistency and the manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749

(9th Cir. 1963). Also, "the interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super 282, 287 (App. Div. 1958).

Here, the testimony from Kownacki was straightforward, detailed, and generally uncontested by petitioner. I accept him as credible.

Appellant's testimony was also credible, he admitted to being late on December 23, and June 4, 2020. However, he disagreed with the determination that he was late on December 28, 2019. He was not scheduled to work on that date but agreed to work an emergency shift. He advised the supervisor who contacted him that he would be late and was told "to get there as soon as possible."

Offense date December 23, 2019, FNDA dated April 16, 2021, (CSV 05209-2021)

I **FIND** that on December 23, 2019, appellant was scheduled to report to work at 7:00 a.m., however, he arrived at 7:07 a.m., less than fifteen minutes late. I **FIND** that appellant admitted that he was seven minutes late and had no excuse for his lateness.

Offense date December 28, 2019, FNDA dated April 16, 2021, (CSV 05211-2021)

I **FIND** that on December 28, 2019, appellant was called in at 5:20 a.m. to work an emergency shift starting at 6:00 a.m., however, he arrived at 6:04 a.m., less than fifteen minutes late. I **FIND** that appellant advised his supervisor at 5:20 a.m. that he would be arriving late. I **FIND** that pursuant to County policy appellant had successfully reported to work for the emergency shift within one hour of being called in.

Offense date June 4, 2020, FNDA dated April 16, 2021 (CSV 05212-2021)

I **FIND** that on June 4, 2019, appellant was scheduled to report to work at 11:00 p.m., however, he arrived at 11:15 p.m., less than fifteen minutes late. I **FIND** that appellant admitted that he was fifteen minutes late and had no excuse for his lateness.

Two issues must be addressed in this matter; first is whether respondent has proven the charges by a preponderance of the evidence, or whether there was a reasonable excuse for appellant's lateness on each of the three dates identified in the FNDA's. The second issue is the appropriate penalty to be imposed.

The Civil Service Act, N.J.S.A. 11A:1-1 et seq., 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 County Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil service law, a public entity should not be burdened with an employee who fails to perform his or her duties. N.J.S.A. 11A:1-2(a). Such an employee may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-20; N.J.A.C. 4A:2-2.2. -2.3(a).

An appeal to the Civil Service Commission requires the OAL to conduct a de novo hearing to determine the appellant's guilt or innocence, as well as the appropriate penalty if the charges are sustained. In re Morrison, 216 N.J. Super. 143, (App. Div.1987). The respondent has the burden of proof and must establish by a fair preponderance of the credible evidence that the appellant was guilty of the charges. 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). Evidence is found to preponderate if it establishes the reasonable probability of the fact alleged and generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div.1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962).

Appellant's status as a corrections officer subject him or her to a higher standard of conduct than an ordinary public employee. In re Phillips, 117 N.J. 567, 576–77 (1990). Law-enforcement employees, such as a correction officer, represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). In military-like settings such as police departments and prisons, it is of paramount importance to maintain strict discipline of employees. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971); Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967).

These matters involve major disciplinary actions, brought by the County against the appellant, seeking suspensions without pay for a period of forty-five working days. N.J.A.C. 4A:2-2.2. In each of the FNDAs issued, appellant was charged with chronic lateness, conduct unbecoming of a public employee, and other sufficient cause violation of County SOP based on his reporting to work late on, December 23, and 28, 2019, and June 4, 2020.

Chronic lateness is not defined in the Civil Service Act and is generally understood to be conduct that continues over a long time and recurs often. In re Ciuppa, CSV 04702-11, Initial Decision (Apr. 24, 2014), adopted, CSC (Jun. 4, 2014), <http://njlawsutgers.edu/collections/oali>. It is further recognized that "numerous occurrences" of habitual tardiness or similar chronic conduct "over a reasonably short space of time, even though sporadic, may be evidence an attitude of indifference amounting to neglect of duty." W. New York v. Bock, 38 N.J. 500, 522 (1962). And "excessive absenteeism is not necessarily limited to instances of bad faith or lack of justification on the part of the employee who was frequently away from [his or] her job." Terrell v. Newark Housing Auth., 92 N.J.A.R 2d (CSV) 750, 752.

As to conduct unbecoming of a public employee, this term has been described as an "elastic" phrase that includes "conduct which adversely affects the morale or efficiency" of the public entity or "which has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] services." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted); see Karins v. City

of Atl. City, 152 N.J. 532 (1998). Unbecoming conduct by a police officer need not be predicated upon a violation of the employer's rules or policies. See City of Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955). Rather, it "may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." In re Tuch, 159 N.J. Super. 219, 224 (App. Div. 1978).

The courts have frequently recognized the sensitive position held by law enforcement officers. It is firmly established that "[t]he obligation to act in a responsible manner is especially compelling in a case involving a law enforcement official." In re Phillips, 117 N.J. 567, 576 (1990). In the words of the Appellate Division:

It must be recognized that a police officer is a special kind of public employee. His primary duty is to enforce and uphold the law. He carries a service revolver on his person and is constantly called upon to exercise tact, restraint and good judgment in his relationship with the public. He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public

[Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966).]

In other words, "[s]ociety reposes in police officers' responsibilities that are simultaneously weighty, sensitive, and fraught with dangerous consequences to themselves, other police officers, and the public." In re Vey, 135 N.J. 306, 308 (1994). They are authorized to carry firearms and to use deadly force in justifiable circumstances, they can engage in high-speed chases, and they are sometimes required to intervene in domestic disputes. Ibid. Conduct by a police officer that indicates "an attitude of mind and approach to the obligation of his office fundamentally at variance with his sworn duty" is a violation of the required standard of behavior inherent in the position. Asbury Park, 17 N.J. at 429–30. Adherence to this high standard of conduct is an obligation that a law enforcement officer voluntarily assumes when he or she enters public service. Emmons, 63 N.J. Super. at 142.

Conduct unbecoming a public employee is not defined in the New Jersey Administrative Code but has been interpreted broadly to include conduct that adversely affects morale and efficiency, or that has a tendency to destroy public respect for the agency or its employees. Emmons, 63 N.J. Super. 136; Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32 (App. Div. 1992).

The appellant has also been charged with "other sufficient cause," pursuant to N.J.A.C. 4A:2-2.3(a)(12), for violating the County lateness policy. Violating a rule or policy means failure to adhere to the standards set forth by the institution, in this case the County, by failing to appear on time for the start of his tours of duty.

Appellant arrived late on each of the three dates identified. However, on December 28, 2019, he was called at 5:20 a.m. and was offered the opportunity to work an emergency shift starting at 6:00 a.m., he accepted the detail and properly advised the supervisor he would be arriving after 6:00 a.m. He arrived to work at 6:04 a.m. after the start of the shift but within one hour of being called in.

Therefore, I **CONCLUDE** the following as to each charge:

Offense date December 23, 2019, FNDA dated April 16, 2021, (CSV 05209-2021)

The appellant was charged with violation of N.J.A.C. 4A:2-2.3(a)(4), chronic or excessive absenteeism or lateness; N.J.A.C. 4A:2-2.3(a)(6) conduct unbecoming a public employee; and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11), specifically, the Mercer County Corrections Center Table of Offenses and Penalties: A-7 Unreasonable excuse for lateness of less than fifteen minutes.

Appellant arrived for work seven minutes late on December 23, 2019. Appellant has a prior history for lateness. When a corrections officer is late for a shift another officer will be held over, which in turn will cause the County to pay that employee overtime. Further, lateness can negatively impact morale of the other corrections officers who must remain on duty to cover for the late arrival.

Applying the law to the facts, I **CONCLUDE** that the respondent has proven, by a preponderance of the competent, credible evidence, the charges of chronic and excessive lateness in violation of N.J.A.C. 4A:2-2.3(a)(4); conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); and N.J.A.C. 4A:2-2.3(a)(11) other sufficient cause, specifically, violation of the Mercer County Corrections Center Table of Offenses and Penalties: A-7 Unreasonable excuse for lateness of less than fifteen minutes, on December 23, 2019.

Offense date December 28, 2019, FNDA dated April 16, 2021, (CSV 05211-2021)

The appellant was charged with violation of N.J.A.C. 4A:2-2.3(a)(4), chronic or excessive absenteeism or lateness; N.J.A.C. 4A:2-2.3(a)(6) conduct unbecoming of a public employee; and N.J.A.C. 4A:2-2.3(a)(11) other sufficient cause, specifically, violation of the Mercer County Corrections Center Table of Offenses and Penalties: A-7 Unreasonable excuse for lateness of less than fifteen minutes.

The credible evidence establishes that on December 28, 2019, appellant was called in at 5:20 a.m. to work an emergency shift starting at 6:00 a.m., however, he arrived at 6:04 a.m. Appellant advised his supervisor when he was first contacted at 5:20 a.m. that he would be arriving late. Further, pursuant to County policy appellant had one hour to arrive to work after being called in. Appellant was compliant with the policy and arrived within one hour of being called in.

Applying the law to the facts, I **CONCLUDE** that the respondent has failed to prove, by a preponderance of the competent, credible evidence, the charge of chronic and excessive lateness in violation of N.J.A.C. 4A:2-2.3(a)(4); conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); and N.J.A.C. 4A:2-2.3(a)(11) other sufficient cause, specifically, violation of the Mercer County Corrections Center Table of Offenses and Penalties: A-7 Unreasonable excuse for lateness of more than fifteen minutes, on December 28, 2019.

Offense date June 4, 2020, FNDA dated April 16, 2021 (CSV 05212-2021)

The appellant was charged with violation of N.J.A.C. 4A:2-2.3(a)(4), chronic or excessive absenteeism or lateness; 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)(11) other sufficient cause, specifically, violation of the Mercer County Corrections Center Table of Offenses and Penalties: A-7 Unreasonable excuse for lateness of more less than fifteen minutes.

On June 4, 2019, appellant was scheduled to report to work at 11:00 p.m., however, he arrived at 11:15 p.m., less than fifteen minutes late. Appellant admitted that he was fifteen minutes late and had no excuse for his lateness.

Applying the law to the facts, I **CONCLUDE** that the respondent has proven, by a preponderance of the competent, credible evidence, the charge of chronic and excessive lateness in violation of N.J.A.C. 4A:2-2.3(a)(4); conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); and N.J.A.C. 4A:2-2.3(a)(11) other sufficient cause, specifically, violation of the Mercer County Correction Center Table of Offenses and Penalties: A-7 Unreasonable excuse for lateness of less than fifteen minutes, on June 4, 2020.

PENALTY

Once a determination has been made that an employee violated a statute, rule, or regulation concerning their employment, the concept of progressive discipline requires consideration. In re Stallworth, 208 N.J. 182.195-96 (2011); Bock, 38 N.J. at 523. When deciding what disciplinary action is an appropriate penalty, the fact finder shall consider the nature of the sustained charges and the appellant's past record. Bock, 38 N.J. at 523-24.

The employee's past record is said to encompass their reasonably recent history of promotions or commendations on the one hand, and on the other hand, any "formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated . . . by having been previously called to the attention of and admitted by the employee." Ibid. Consideration as to the timing of the most recently adjudicated disciplinary history should also be given. Id. at 524.

However, the theory of progressive discipline is not a fixed rule to be followed without question. In re Carter, 191 N.J. 474, 484 (2007). “[S]ome disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record.” Ibid. The question for the fact finder is whether the disciplinary action is so disproportionate to the offense, considering all the circumstances, to shock one's sense of fairness. Ibid. Removal has been upheld where the acts charged, with or without a prior disciplinary history, have warranted imposition of that sanction. Ibid.

Hence an employee may be removed, without regard to progressive discipline, if their conduct was egregious. Ibid.; in re Herrmann, 192 N.J. 19, 33-34 (2007). Indeed, progressive discipline “is not a necessary consideration when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.” Herrmann, 192 N.J. at 33.

Here, based upon the charge of lateness the appellant is subject to discipline pursuant to the Mercer County Public Safety Table of Offenses Corrections Center (MCTOCC) which specifies the length of suspension based upon the number of times an employee reports late to work:

Offense date December 23, 2019, FNDA dated April 16, 2021, (CSV 05209-2021)

Having concluded that the appellant was less than fifteen minutes late for work on December 23, 2019, without a reasonable excuse, he has incurred a level four infraction. Accordingly, the MCTOCC requires a suspension of ten working days.

Offense date December 28, 2019, FNDA dated April 16, 2021, (CSV 05211-2021)

Having concluded that the respondent failed to prove the violations alleged no penalty needs to be imposed.

Offense date June 4, 2020, FNDA dated April 16, 2021 (CSV 05212-2021)

Having concluded that the appellant was less than fifteen minutes late for work on June 4, 2020, without a reasonable excuse, he has occurred a level five infraction. Accordingly, the MCTOCC requires a suspension of fifteen working days.

Based upon the sustained charges together with appellant's disciplinary history for lateness, I **CONCLUDE** that the imposition of a suspension of twenty-five working days is appropriate.

ORDER

For the reasons set forth above, it is **ORDERED** that the charges entered on the FNDA, dated December 30, 2019, (CSV 05209-2021) by the respondent, Mercer County Corrections Center, against the appellant, Mark Griffith, are hereby **SUSTAINED**.

For the reasons set forth above, it is **ORDERED** that the charges entered on the FNDA, dated January 10, 2020, (CSV 05211-2021) by the respondent, Mercer County Corrections Center, against the appellant, Mark Griffith, are hereby **REVERSED**.

For the reasons set forth above, it is **ORDERED** that the charges entered on the FNDA, dated June 16, 2020, (CSV 05212-2021) by the respondent, Mercer County Corrections Center, against the appellant, Mark Griffith, are hereby **SUSTAINED**.

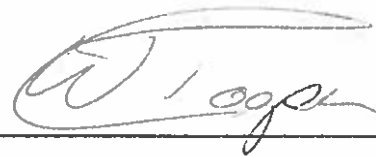
I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

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

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

January 27, 2023

DATE



WILLIAM T. COOPER, III, ALJ

Date Received at Agency:

January 27, 2023

Date E-Mailed to Parties:

WTC/am

APPENDIX

WITNESSES

For appellant

Mark Griffith

For respondent

Michael Kownacki

EXHIBITS

For appellant

None

For respondent

- R-1 Preliminary Notice of Disciplinary Action, dated December 30, 2018
- R-2 iSeries Timekeeper Record, dated December 23, 2018
- R-3 Attendance & Overtime Record
- R-4 Mercer County Corrections Center, Department of Public Safety Standards and Operating Procedures 136
- R-5 Preliminary Notice of Disciplinary Action, dated January 10, 2020
- R-6 iSeries Timekeeper Record, dated December 28, 2019
- R-7 Time and Attendance Record
- R-8 Preliminary Notice of Disciplinary Action, dated June 16, 2020
- R-9 iSeries Timekeeper Record — June 4, 2020
- R-10 Attendance & Overtime Record — June 4, 2020
- R-11 Time and Attendance Record
- R-12 Mark Griffith Disciplinary History as of March 12, 2021
- R-13 Mercer County Public Safety — Table of Offenses and Penalties
- R-14 Collective Bargaining Agreement
- R-15 Decision of Hearing Officer, dated March 18, 2021
- R-16 FNDA, dated December 30, 2019
- R-17 FNDA, dated January 10, 2020

R-18 FNDA, dated June 16, 2020